Supreme Court, U. S.
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78-1183

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

CARBON FUEL COMPANY,

Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236, UNITED MINE WORKERS OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For the Fourth Circuit

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CARBON FUEL COMPANY,

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vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236, UNITED MINE WORKERS OF AMERICA,

Respondents.

Petitioner, Carbon Fuel Company, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) entered in this case on October 31, 1978.

I. OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not yet been published. It is appended to this petition as Appendix A, pp. A1—A10 *infra*. The District Court for the Southern District of West Virginia did not render an opinion.

II. JURISDICTION

The opinion of the Fourth Circuit was announced on September 21, 1978. Petitioner's timely petition for rehearing was denied by order filed October 31, 1978, and this petition was filed within ninety days of that date.

The Court's jurisdiction is involved under 28 USC § 1254(1).

III. QUESTION PRESENTED

When, if ever, may a union be held liable for unauthorized strikes in violation of a collective bargaining agreement because of the Union's failure to take reasonable steps to end or prevent the strikes?

IV. STATUTE INVOLVED

This case involves § 301 of the Labor-Management Relations Act (LMRA), 61 Stat. 156, 29 USC § 185, printed in the Appendix at App. B, B1, 2 *infra*.

V. STATEMENT OF THE CASE

1. INTRODUCTION.

This is an action under § 301 of the LMRA by Carbon Fuel Company (the Employer) against the labor organizations representing its production and maintenance employees (Unions), the International Union, United Mine Workers of America (International), which is the duly recognized collective bargaining agent for the Employer's production and maintenance employees, and its administrative sub-divisions, District 17, United Mine Workers of America (the District) and Local Unions Nos. 6572, 7626 and 2236, United Mine Workers of America (the Locals). The action seeks damages for a series of forty-eight strikes occurring during the years 1969-1973, inclusive, allegedly in violation of the terms of the two collective bargaining agreements between the unions and the employer, the National Bituminous Coal Wage Agreement of 1968 and the National Bituminous Coal Wage Agreement of 1971 (contracts). The contracts, while containing no express "no-strike" clause,

both contain a mandatory grievance and arbitration procedure encompassing all imaginable disputes between the parties together with an express promise "to maintain the integrity of their contract and that all disputes and claims which are not settled by agreement shall be settled by the [grievance] machinery . . . ."[1]

2. PROCEEDINGS IN THE DISTRICT COURT.

The case was tried in March and April, 1976, in the United States District Court for the Southern District of West Virginia (K. K. Hall, Judge), before a jury. The evidence showed, without substantial contradiction, the occurrence of forty-eight separate strikes; and that each was engaged in by all of the members of the unions employed at the involved locations. It further showed that none of the strikes was formally called or authorized by the unions; that the unions had a policy against such strikes, and upon their occurrence tried to persuade and/or direct the strikers to return to work; but, although often threatening to do so, took no disciplinary action or other means which were available to them to end or prevent the strikes. There was substantial evidence that the means employed by the Unions were, and known to them to be, futile. The evidence further showed that thirty-one of the strikes were over disputes between the employer and the union involving the application and interpretation of portions of the contracts dealing with wages, hours and other terms and conditions of employment, and that seventeen of the strikes, while involving a dispute over the extent of the no-strike obligation under the contracts, arose from disputes not between the employer and the unions, but instead from matters out-

[1] These provisions of the 1968 contract were held in *Gateway Coal Co. v. UMWA*, 414 U.S. 368 (1974) to give rise to an implied no strike clause as to strikes over disputes settleable under the grievance and arbitration procedures. *Id.* at 381 and 384.

side the employment relationship, such as internal union disputes, political protests, and sympathy for strikers from other coal operator employers.

At the conclusion of the evidence, the District Court refused the motions of the International and District for a directed verdict based upon their claim that there was insufficient evidence of their liability. It further directed the jury to find that all the strikes were violations of the contracts and that the locals were responsible for those strikes because of the mass actions of their members and officers in engaging in them. The Court submitted the questions of the amounts of damages, and the responsibility of the District and International, to the jury. Its charge relating to International and District liability told the jury that the District and International had a responsibility under the contracts to use all reasonable means available to them to prevent and end strikes in violation of the contracts, and that from such time as they had an opportunity to use such means and failed to do so, they were liable for the strikes.

After extensive deliberations, the jury returned individual verdicts as to each strike, awarding damages against the locals in a total amount of $722,347.43, against the District in the total amount of $242,130.80 and against the International in a total amount of $206,547.80. The verdicts were joint and several, rather than cumulative. The verdicts reflected an obvious determination by the jury under the Court's "all reasonable means" instruction that the District and International were responsible for only some of the strikes, and only a portion of the damages as to those strikes. The Unions' motion to set aside the verdicts and award a new trial was denied, and they appealed.

3. PROCEEDINGS IN THE FOURTH CIRCUIT.

Upon appeal, the Fourth Circuit reversed the judgments as to the seventeen strikes over disputes not arising from the employment relationship as to all of the unions; and affirmed the judgments as to the remaining thirty-one strikes as to the locals. In addition, the Appeals Court reversed all judgments as to the District and International on the grounds that the instruction relating to their duty to use all reasonable means available to them was erroneous, and that the law of the Fourth Circuit with regard to union liability for "wildcat" strikes is as stated in the case of *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, at 877-78 (4th Cir. 1955), cert. denied, 350 U.S. 847 (1955). Quoting from that case, the Court said:

> " 'If [the representatives of UMWA] had done nothing when plaintiff called on them to help get the men back to work, there would have been no liability on the part of the defendants. This being true, defendants were not rendered liable by the efforts which these men made to bring about an adjustment of the difficulty, even if they did not do everything that they might have done to that end. The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike. There is no evidence of any sort that they did.' "
> [App. A, pp. A9, 10.]

Upon that holding, the Court further held:

> "In our opinion the present case falls squarely within the four corners of *Haislip*. There was no evidence presented in the district court that either the District or International Union instigated, supported, ratified, or encouraged any of the work stoppages, and under these circumstances it was

> error for the court to deny the motions of these defendants' for directed verdicts."
> [App. A, pp. A10]

It is these holdings which are contested here.

The Employer timely filed a petition for rehearing and suggestion of rehearing en banc. That petition was denied October 31, 1978. On November 13, 1978, the Fourth Circuit stayed its mandate pending application to this Court for a writ of certiorari, and final decision of this Court upon the case. This petition followed.

VI. REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS IN DIRECT AND ACKNOWLEDGED CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

In reaching its holding that if the International and District had "done nothing", they would not have violated the contracts, the Fourth Circuit recognized that its decision was in direct conflict with those of the United States Court of Appeals for the Third Circuit applying identical contract language, in *United States Steel Corp.* v. *UMWA*, 534 F.2d 1063 (3rd Cir. 1976), and *Republic Steel Corp.* v. *UMWA*, 570 F.2d 467 (3rd Cir. 1978), App. A, pp. A7, 8. Since the decision below, the Third Circuit has reaffirmed its holding that the International " 'has a particularly grave responsibility to employ all reasonable means to insure that unlawful [wildcat strike] actions be halted.' " *Bituminous Coal Operators' Association* v. *International Union, UMWA*, 585 F.2d 586, 596 (3rd Cir. 1978), quoting from *Republic Steel, supra*, 570 F.2d at 479.

The Fourth Circuit's holding is likewise in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Wagner Electric Corp.* v. *Local 1104, IUE*, 496 F.2d 954 (8th Cir. 1974), where the Court said: "A union is required to use its best efforts to return striking workers to their jobs if it is not to be held responsible for their actions." *Id.* at 956. On the other hand, the Fourth Circuit's position is supported by the decisions of the United States Court of Appeals for the Sixth Circuit. As noted in the decision below, that Court, in *Southern Ohio Coal* v. *UMWA*, 551 F.2d 695 (6th Cir. 1977) cert. denied, 434 U.S. 876 (1977), refused to hold the International responsible for failure to act to end wildcat strikes.[2] App.A, p. A8.

This conflict between the Circuits is square and irreconcilable. In particular, the Third and Fourth Circuits, interpreting identical language, and in some instances

[2]The positions of the United States Courts of Appeals for the Fifth and Seventh Circuits are not clear. As noted in the opinion below (App.A, pp. A8, 9), the Seventh Circuit in *Old Ben Coal Corp.* v. *Local Union No. 1487 of UMWA*, 457 F.2d 162 (7th Cir. 1972), interpreted the language contained in both agreements in this case which abrogate express "no strike" clauses contained in prior agreements as protecting "the Union from liability for spontaneous or 'wildcat' strikes *which would be the kind of work stoppages subject to the settlement procedures of the agreements.*" 457 F.2d at 165. [Emphasis added] What the Seventh Circuit means by this emphasized language is a mystery. Surely it does not mean that employers may grieve over such strikes, as it is universally recognized that the grievance procedures of the contracts are employee oriented and only the unions or its members may file grievances. At any rate, there is no indication in that decision, or other decisions of the Seventh Circuit, that the Court considered whether there existed an obligation on the International or any of its subdivisions to take affirmative action.

The Fifth Circuit did consider the point in *United States Steel Corp.* v. *UMWA*, 519 F.2d 1249 (5th Cir. 1975). There the Court cited the Third Circuit's decision in *Eazor Express, Inc.* v. *Teamsters*, 520 F.2d 951 (3rd Cir. 1975) cert. denied, 424 U.S. 935 (1976), and apparently adopted its holding requiring the exercise of all reasonable means by a union to avoid liability. *United States Steel Corp.*, 519 F.2d at 1255. Later it apparently limited that application of the doctrine to situations where, as here, there is a pattern of strikes when it said:

> "Furthermore, a series of unauthorized strikes should put the union on notice, and as suggested, raise the level of effort required to exculpate themselves from liability." [519 F.2d at 1256]

However, upon rehearing, the Court appeared to direct the lower court upon remand to decide whether to adopt the doctrine. *United States Steel Corp.* v. *UMWA*, 526 F.2d 377, 378 (5th Cir. 1976).

identical contracts, have reached diametrically opposite results. The issue is very much alive as the present National Bituminous Coal Wage Agreement of 1978 contains the same language. None of the conflicting decisions have been superseded, or have lost any weight by reason of subsequent decisions.

Moreover, this case is perfectly suited for resolution of the conflict. The issue has been fully tried in the District Court, with the issue raised and decided on motion to dismiss the complaint, and motion for directed verdict and judgment notwithstanding the verdict. The District Court either received or permitted by avowal testimony all evidence which the parties wished to introduce relating to the issue. No issue as to the refusal of testimony on this issue was raised on appeal in the Fourth Circuit. The Fourth Circuit clearly and unequivocally decided the issue. Its resolution is essential to the outcome of the case, in that a resolution of the question would necessarily either result in reinstatement of the judgment upon the jury's verdicts against the International and District or affirmance of the Fourth Circuit direction that the International and District be dismissed.

In short, the conflict between decisions of the various circuits justifies the grant of certiorari to review the judgment below.

2. THE ISSUE OF THE OBLIGATION OF A UNION WITH REGARD TO UNAUTHORIZED STRIKES BY ITS MEMBERS IN VIOLATION OF COLLECTIVE BARGAINING CONTRACTS IS AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The importance of the question presented is so obvious

as to require little argument. It deals with the effectiveness of the process of collective bargaining in achieving the chief objective of the nation's labor laws—the maintenance of industrial peace.

As this Court pointed out in another context in *Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, at 103-04 (1962), (citations omitted):

> "More important, the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.
>
> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling."

The effect of the present lack of uniformity is just the

sort of substantial uncertainty, with its resulting unhappy consequences, described in *Lucas Flour*.

That effect is best demonstrated by the case of *Bituminous Coal Operators' Association* v. *International Union, U.M.W.A. supra.* In that case, Bitumnious Coal Operators' Association (BCOA), the employers' association representing operators in collective bargaining with the International, filed a suit in the United States District Court for the Western District of Pennsylvania seeking a declaration interpreting the language here in issue and an injunction against the International enforcing its alleged obligations to prevent and end unauthorized strikes by its members at the operations of operator members of BCOA. In a companion case, *Consolidation Coal Co., et al.* v. *International Union, U.M.W.A.*, 431 F.Supp. 787 (W.D. Pa. 1977), individual operator members of BCOA who had operations in the Third and other Circuits sought similar relief. The District Court dismissed the complaint of BCOA for, among other reasons, that its members have operations in other circuits where the availability of relief is "quite different". *Bituminous Coal Operators Association* v. *International Union, U.M.W.A.*, 431 F.Supp. 774, 784 (W.D. Pa. 1977). The individual operators' case was dismissed as to the claim for injunctive relief upon the same grounds. *Consolidation Coal Co.* v. *International Union, U.M.W.A.*, 431 F.Supp. at 791-92. Upon consolidated appeals, the Third Circuit reversed the dismissals and remanded the cases for a determination as to the declaratory relief sought by BCOA and the injunctive relief and damages sought by the individual operators. *Bituminous Coal Operators' Association* v. *International Union, U.M.W.A.*, 585 F.2d (3rd Cir. 1978). In so doing, the Court of Appeals acknowledged the fact that some operations of the operator plaintiffs are in different

circuits which have different views as to this issue and that this fact raised a difficulty which "might, in the end, be a reason for denying some of the requested relief". However, the Court held that this difficulty was not "a reason for refusing to hear the case." *Id.* at 592. Moreover, the Court suggested that as Republic Steel Corporation was a signatory to the 1974 National Bituminous Coal Wage Agreement, the holding which it obtained in *Republic Steel Corporation* v. *U.M.W.A., supra,* "can be relied upon not only by the Republic Steel Corporation but also by other signatories to the same contract, since the International is collaterally estopped on the issues actually litigated and determined against it." *Bituminous Coal Operators' Association,* 585 F.2d at 596. No mention is made of the potential collateral estoppel effort of contrary decisions involving other signatories, such as the Employer here, in other circuits.

The District Court, upon remand of those cases, has a difficult, if not impossible job. That difficulty occurs not from the lack of clarity of the law in the Third Circuit, but instead from issues of comity and collateral estoppel between different circuits, reaching different results in interpreting identical language in collective bargaining agreements between identical parties or their privies in contract. That same difficulty is shared by the parties to the contract, which is applied in one way in one geographical location, and another in a different one.

So far as research has determined, this Court has not decided the issue here involved. Because of its obvious importance, and the obvious ill effects of differing decisions as to it upon the administration of National Labor Policy, certiorari should be granted in this case to resolve the conflict.

3. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES ENUNCIATED IN THE DECISIONS OF THIS COURT IN FASHIONING SUBSTANTIVE FEDERAL LABOR LAW FROM THE POLICY OF OUR NATIONAL LABOR LAWS.

In *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), at page 456, this Court held that: "the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws." As held in that case, the primary concern of Congress in enacting § 301 was: "that unions as well as employers should be bound to collective bargaining agreements . . . [and] that there be a procedure for making such agreements enforceable in the Courts . . . ." *Id.* at 453. This purpose is readily deducible from the Senate Report on the Act. quoted in *Lincoln Mills, supra*, at 454:

> " 'If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> 'Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce.' "

The decision by the Lower Court negates this policy. If a union, such as the International, can sign a collective bargaining agreement promising to refrain from striking over issues arbitrable under that agreement; delegate the performance of that promise to its judgment proof locals; and then, with impunity, do nothing when those locals repeatedly and flagrantly violates the promise, then the agreement is illusory, and the policy of our national labor laws to promote industrial peace through the execution and enforcement of agreements, is defeated.

VIII. CONCLUSION

For all the reasons above asserted, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1422

CARBON FUEL COMPANY,

v. *Appellee,*

UNITED MINE WORKERS OF AMERICA:
DISTRICT No. 17,
United Mine Workers of America;
LOCAL UNION No. 6572,
United Mine Workers of America;
LOCAL UNION No. 7626,
United Mine Workers of America; and
LOCAL UNION No. 2236,
United Mine Workers of America,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON.
K. K. HALL, DISTRICT JUDGE.

Argued: December 7, 1977 Decided: September 21, 1978

Before HAYNSWORTH, Chief Judge; BUTZNER, Circuit Judge, and FIELD, Senior Circuit Judge.

FIELD, Senior Circuit Judge:

Carbon Fuel Company filed an action under Section 301 of the Labor-Management Relations Act of 1947, as

amended, 29 U.S.C. §185, against three local unions of the United Mine Workers of America (UMWA)[1], UMWA District 17, and the International Union, seeking injunctive relief and damages incident to forty-eight work stoppages which occurred during the years 1969 through 1973 at various mines of Carbon Fuel in southern West Virginia. Carbon Fuel and UMWA were parties to a collective bargaining contract known as the "National Bituminous Coal Wage Agreement of 1971", which contract became effective on November 12, 1971, but which expired prior to the trial of this case, leaving only the question of damages to be tried. The issues at trial were whether the alleged stoppages had occurred, whether they were actionable, and the damages allocable to each actionable stoppage. Under the agreed procedure, the jury considered the evidence and returned a separate verdict for each stoppage. Verdicts were returned by the jury aggregating $206,547.80 against the International Union, $242,130.80 against District 17, and $722,347.43 against the three local Unions. Judgments were entered pursuant to the verdicts with respect to each stoppage, and all of the UMWA defendants have appealed.

The case came on for trial after our decision in *Armco Steel Corp.* v. *UMWA*, 505 F.2d 1129, *cert. denied* 423 U.S. 877 (1975), but prior to the Supreme Court's decision in *Buffalo Forge* v. *Steel Workers*, 428 U.S. 397 (1976), and was tried and evidence presented on the basis of *Armco*. The district court, relying upon *Armco*, ruled as a matter of law that each of the stoppages was violative of the collective bargaining agreement. Seventeen of the forty-eight stoppages were "sympathy

[1]The local unions named as defendants were Nos. 6572, 7626, and 2236.

strikes",[2] and Carbon Fuel now concedes that in the light of *Buffalo Forge* it was error for the court to direct the jury that these seventeen stoppages violated the collective bargaining agreement. Despite this concession, however, Carbon Fuel contends that its judgments with respect to these stoppages should not be vacated and dismissed, but rather that they should be remanded to the district court with directions that they be referred to arbitration upon the issue of whether the action of the UMWA members in refusing to cross picketlines or in engaging in the various work stoppages violated the collective bargaining agreement. Carbon Fuel suggests that upon receipt of the arbitrators' decision the district court can then either reinstate or finally vacate the judgments as to these stoppages.

In our opinion, the answer to this contention of Carbon Fuel is found in *Buffalo Forge* itself. In that case the arbitrability of the question of whether the production employees were required to cross the picketline was conceded, 428 U.S., *supra,* at 410, due to the fact that the agreement contained an express no-strike clause. The Court made it clear, however, that in the absence of such a clause, a sympathy strike is neither actionable nor arbitrable:

> "The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of its bargain. *Thus, had the contract not contained a no-strike clause or had the clause expressly excluded sympathy strikes, there would have been no possible basis for implying from the existence of*

[2]None of these stoppages was in support of any "sister unions", but they did qualify as "sympathy strikes" under *Buffalo Forge* since they were not the result of any dispute between the Union and the company. The reasons for these stoppages ranged from political protests to intraunion disputes.

> *an arbitration clause a promise not to strike that could have been violated by the sympathy strike in this case.*" (Emphasis supplied).

428 U.S., *supra*, at 408. This statement of the Court is clarified by its observation in footnote 10, *Id*, that the courts of appeals, including our court in *Armco*, who had "assumed that a mandatory arbitration clause implies a commitment not to engage in sympathy strikes," were wrong.

Our conclusion on this point is in accord with decisions of the Third and Sixth Circuits. In *United States Steel Corp.* v. *United Mine Workers*, 548 F.2d 67 (3 Cir. 1976), the court stated:

> "Had the contract in the instant case contained a no-strike clause, the issue whether the sympathy strike violated the union's no-strike undertaking might have been arbitrable. In the absence of a no-strike clause, however, *Buffalo Forge* establishes that there is 'no possible basis for implying from the existence of an arbitration clause a promise not to strike that could have been violated by the sympathy strike' in this case.

Id. at 73. The court further observed that "[w]hat *Buffalo Forge* establishes regarding the arbitrability of sympathy strikes is as applicable to this particular suit for monetary damages as it is to a request for injunctive relief." *Id.* at 72. Similarly, in *Southern Ohio Coal Co.* v. *U. M. Wkrs. of America*, 551 F.2d 695 (6 Cir. 1977), the court found that the absence of a no-strike clause was fatal to the company's claim of arbitrability, stating:

> "The Bituminous Coal Wage Agreement of 1974 does not contain an express no-strike clause so the issue of the union's right to refuse to cross a picketline is not even arguably arbitrable."

Id. at 705.

We do not find our recent decision in *Cedar Coal Co.* v. *United Mine Wkrs. of America*, 560 F.2d 1153 (1977), at odds with our conclusion on this point. In *Cedar Coal* we recognized that there was a question as to whether the object of the strike was to compel the company to concede an arbitrable issue and address ourselves only to the denial of injunctive relief pending arbitration. Upon the record before us we discern no such issue in the present case and, accordingly, the judgments based upon these seventeen stoppages are reversed.

The remaining thirty-one work stoppages were concededly precipitated by disputes between members of the UMWA and Carbon Fuel which were subject to the arbitration provisions of the collective bargaining agreement. However, all of these stoppages were properly characterized as wildcat strikes and, accordingly, it is necessary to consider the responsibility, if any, of the several defendants for the resultant damages. The district court directed verdicts of liability against the Locals for the majority of these strikes on the basis of the "mass action" theory of responsibility. The genesis of this theory is generally attributed to Judge Goldsborough's decision in *United States* v. *International Union, U.M.W. of A.*, 77 F.Supp. 563 (D.C. 1948), where he stated "that as long as a union is functioning as a union it must be held responsible for the mass action of its members." *Id.* at 566. Over the years this theory of responsibility has been refined and applied by a number of courts,[3] and its rationale was recently stated by the Third Circuit in *Eazor Exp., Inc.* v. *International Bro. of Team.*, 520 F.2d 951 (1975), as follows:

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[3] *See e. g. Vulcan Materials Co.* v. *United Steelworkers of America*, 430 F.2d 446 (5 Cir. 1970); *United Textile Workers* v. *Newberry Mills, Inc.*, 238 F.Supp. 366 (W.D. S.C. 1965).

> "When all the members of a union employed by a given employer engage in a concerted strike not formally authorized by the union, as happened here, many courts hold the union responsible on the theory that mass action by union members must realistically be regarded as union action. The premise is that large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members."

Id. at 963. However, responsibility for wildcat strikes under this theory will ordinarily be limited to the local union. This was recognized in *U. S. Steel Corp.* v. *United Mine Workers of America*, 534 F.2d 1063 (3 Cir. 1976):

> "Consistent with theory, however, the liability must be limited to the entity whose membership acts in concert. In most cases, as here, that entity will be the local union. Thus absent a showing of complicity on the part of a larger union entity —the District or International Union, for example —only the local can be held liable under the mass action theory."

Id. at 1074.

In our opinion the "mass action" theory, properly applied, represents a sensible and pragmatic approach to this difficult problem in the area of labor relations. In view of the uncontradicted evidence that all of the members of the defendant Locals, including their officers, participated in the strikes, the theory was properly employed by the district court in placing responsibility upon the Locals. Accordingly, the judgments against the Locals growing out of these thirty-one work stoppages are affirmed.

In regard to District 17 and the International Union, the district court charged the jury that these defendants had the duty and responsibility to use all reasonable

means to prevent or terminate the wildcat strikes, and that the failure to do so would render them liable for the work stoppages. The court further instructed the jury that the District and International could be held liable if the jury found that the Locals were acting within the scope of their authority as agents of the District and International. The defendants contend that these instructions ignored the history of the collective bargaining agreement and misconstrued its terms. Additionally, they urge that in giving such instructions the district court failed to follow the controlling precedent in this circuit, *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872 (4 Cir. 1955).

The bargaining history which was chronicled in *International U., U.M.W. of A.* v. *National Lab. Bd.*, 257 F.2d 211 (D.C. Cir. 1958), discloses that as late as 1941, the contract contained an express agreement not to strike. However, following the passage of the Taft-Hartley Act, 29 U.S.C. § 141, *et seq.*, the 1947 agreement rescinded all "no-strike", "penalty", and "illegal suspension of work" clauses which had been contained in earlier agreements. The reason for this was to protect the union from potential law suits under Taft-Hartley. Thereafter, during the brief period from 1950 to 1952 the contract contained an express clause which required the Union to exercise its "best efforts" to prevent work stoppages. However, that provision was eliminated two years later. The bargaining history shows that the agreements from 1972 through 1977 neither imposed any "best efforts" duties on the International nor did they contain any indemnity obligation which would make the International vicariously liable for local wildcat stoppages. In instructing the jury in this fashion, the district court apparently followed *Eazor Exp., Inc.* v. *International Bro. of Team., supra*, 520 F.2d 951, and *U. S. Steel* v. *United Mine Workers*,

supra, 534 F.2d 1063. In the latter case the Third Circuit stated that "[a] covenant to maintain the integrity of the contract necessarily embraces a reasonable efforts obligation to comply with the [implied] no-strike promise." *Id.*, at 1073. In all deference, we cannot agree with this conclusion. In the light of the bargaining history, it appears to us that such an interpretation, in effect, rewrites the terms of the contract upon which the parties had agreed.[4]

The rationale of the Third Circuit in *Eazor* has not been generally accepted. In *Southern Ohio Coal* v. *U. M. Wkrs., supra*, 551 F.2d 695, the Sixth Circuit declined to follow *Eazor*, stating that "there is no authority in this circuit for the proposition that a union may be held responsible * * * for failure to use its 'best efforts' in curtailing [unauthorized strikes]. On the contrary this Court has repeatedly held that a union may only be held responsible for the authorized or ratified actions of its officers and agents." *Id.*, at 701. Similarly, in *Old Ben Coal Corp.* v. *Local U. No.* 1487 *of United Mine Wkrs.*, 457 F.2d 162 (1972), the Seventh Circuit referred to the bargaining history and stated:

> "Implying a no-strike obligation in the 1968 agreement does not render the express abrogation of previous no-strike clauses meaningless as then Circuit Judge Stewart indicated in [*Lewis* v. *Benedict Coal Corporation*, 259 F.2d 346 (6 Cir. 1958)]. By virtue of that language, the Union has preserved the right to strike with respect to all disputes not subject to settlement by other methods made exclusive by the agreement. *In addition the language protects the Union from liability for spontaneous or 'wildcat' strikes which would be the kind of work stoppages subject to the settlement procedures of the agreement.*" (Emphasis Supplied).

[4]We also decline to follow the rationale applied in the recent case of *Republic Steel Corp.* v. *U.M.W. of America*, 570 F.2d 467 (3 Cir. 1978).

Id at 164.

The position of the Sixth and Seventh Circuits accords with our decision in *Haislip* which has been described as "a major case in this area."[5]. In *Haislip* Judge Parker stated the law of this circuit clearly and unequivocally:

> "What we are dealing with is, not a case where circumstantial evidence points to instigation of a strike by defendants or the agents who represented them, but a 'wild cat' strike of local origin, without anything to suggest that defendants or their agents had anything to do with bringing it about. [The representatives of UMWA] were called in to try to end the strike and get the men to go back to work, and everything that they did was directed to that end. Even if the testimony as to their advising the men to go back to work be disregarded and it be assumed that they did nothing of the sort, there is no evidence to support the view that they adopted the strike, that they encouraged it or that they prolonged it.
>
> * * * * * * * *
>
> There is nothing in the contract making defendants liable for 'wild cat' strikes or requiring that they take any action with regard to them. This court has pointed out that employees who engage in 'wild cat' strikes lose the protection of the Fair Labor Standards Act and may be discharged by their employers with inpunity for so doing. *N.L.R.B.* v. *Draper Corporation*, 4 Cir. 145 F.2d 199, 156 A.L.R. 989. We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do; and there manifestly is no such liability. If [the representatives of UMWA]

[5]*United States Steel Corp.* v. *United Mine Wkrs. of A.*, 519 F.2d 1249, 1253 (5 Cir. 1975).

had done nothing when plaintiff called on them to help get the men back to work, there would have been no liability on the part of the defendants. This being true, defendants were not rendered liable by the efforts which these men made to bring about an adjustment of the difficulty, even if they did not do everything that they might have done to that end. The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike. There is no evidence of any sort that they did."

223 F.2d 872, 877-878.

In our opinion the present case falls squarely within the four corners of *Haislip*. There was no evidence presented in the district court that either the District or International Union instigated, supported, ratified, or encouraged any of the work stoppages, and under these circumstances it was error for the court to deny the motions of these defendants' for directed verdicts.

We have carefully considered the other issues raised on this appeal, and are of the opinion that the district court's conduct of the trial, including its evidentiary rulings and modified "Allen charge", fell well within the acceptable limits of judicial discretion. Accordingly, the judgments against District 17 and the International Union are vacated and remanded with directions to dismiss as to these defendants. The judgments against the Locals on the seventeen sympathy stoppages are also vacated. The remaining thirty-one judgments against the Locals are affirmed.

AFFIRMED in part;
VACATED and
REMANDED in part.

APPENDIX B

STATUTE INVOLVED

§ 185. Suits by and against labor organizations
Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers

or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Supreme Court, U. S.
FILED
JUN 1 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY,

Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, United Mine Workers of America; and LOCAL UNIONS NOS. 6572, 7626, and 2236, United Mine Workers of America,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Certiorari filed January 29, 1979
Certiorari Granted March 19, 1979

JARRETT PRINTING COMPANY, CHARLESTON, W. VA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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vs.

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Portions of Plaintiff's Complaint

IN THE

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

CARBON FUEL COMPANY,

Plaintiff,

vs. Civil Action No. 74-152 CH

UNITED MINE WORKERS OF AMERICA; DISTRICT NO. 17, United Mine Workers of America; LOCAL UNION NO. 6572, United Mine Workers of America; LOCAL UNION NO. 7626, United Mine Workers of America; and LOCAL UNION NO. 2236, United Mine Workers of America,

Defendants.

COMPLAINT

The plaintiff, Carbon Fuel Company, a corporation, for its complaint against the above-named defendants, avers and says:

1. This action is brought under §301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185, and this Court has jurisdiction of this action under said §301 of this Act.

2. The plaintiff, Carbon Fuel Company, is a corporation organized and existing under and by virtue of the laws of the State of West Virginia; is engaged in the mining, preparation, and shipment of bituminous coal,

an industry affecting commerce as defined in said Act; and carries on said business and employs employees therein at its Carbon and Winifrede Division coal mines, and related facilities, in Kanawha and Boone Counties, and other localities, in the Southern District of West Virginia, within the jurisdiction of this Court. Specifically, Carbon Fuel Company, during the times here relevant, has operated in its Carbon Division on Cabin Creek near Carbon, Kanawha County, its Nos. 7, 9, 20, 20A, 28, 29, 36, 39 and 41 mines; and in its Winifrede Division, on Fields Creek, near Winifrede in Kanawha County, West Virginia, its Nos. 6, 18 ,31, Morton or 34 and 38 mines, and their related facilities.

3. The defendant, United Mine Workers of America, is an unincorporated association and labor organization, having its principal office at 900 15th Street, N.W., Washington, D. C.; and said defendant, through its duly authorized officers and agents, is engaged in representing and acting for employee members including employees of the plaintiff, at plaintiff's said mines and related facilities, including those recited in paragraph number 2 above, within the jurisdiction of this Court.

4. The defendant, District No. 17, United Mine Workers of America, is an unincorporated association and labor organization, and is an administrative division and agency of the defendant, United Mine Workers of America. Said defendant has its principal office at 1300 Kanawha Boulevard, East, Charleston, West Virginia, and is engaged in representing and acting for employee members, including employees of the plaintiff, Carbon Fuel Company, at its said mines and related facilities, within the jurisdiction of this Court. In all things hereinafter alleged, the defendant, District No. 17, United Mine Workers of America, has acted within the scope of

and pursuant to its agency relationship to the defendant United Mine Workers of America.

5. The defendant, Local Union No. 6572, United Mine Workers of America, is an unincorporated association and labor organization, and is an administrative division and agency of the defendants, United Mine Workers of America, and District No. 17, United Mine Workers of America, and is engaged in representing and acting for employee members, including employees of the plaintiff at Nos. 9, 28, 29, 39 and 41 mines and related facilities, within the jurisdiction of this Court. In all things hereinafter alleged, the defendant Local Union No. 6572, United Mine Workers of America, has acted within the scope of and pursuant to its agency relationship to the defendants District No. 17, United Mine Workers of America, and United Mine Workers of America.

6. The defendant, Local Union No. 7626, United Mine Workers of America, is an unincorporated association and labor organization, and is an administrative division and agency of the defendants, United Mine Workers of America and District No. 17, United Mine Workers of America, and is engaged in representing and acting for employee members, including employees of the plaintiff at its aforesaid Nos. 7, 20, 20A and 36 mines and related facilities, within the jurisdiction of this Court. In all things hereafter alleged, the defendant, Local Union No. 7626, United Mine Workers of America, has acted within the scope of and pursuant to its agency relationship with the defendants, United Mine Workers of America and District No. 17, United Mine Workers of America.

7. The defendant, Local Union No. 2236, United Mine Workers of America, is an unincorporated association and labor organization, and is an administrative division

and agency of the defendants, United Mine Workers of America and District No. 17, United Mine Workers of America, and is engaged in representing and acting for employee members, including employees of the plaintiff, at its aforesaid Nos. 6, 8, 31, 34 or Morton, and 38 mines and related facilities, within the jurisdiction of this Court. In all things hereafter alleged, the defendant, Local Union No. 2236, United Mine Workers of America, has acted within the scope of and pursuant to its agency relationship with the defendants, United Mine Workers of America and District No. 17, United Mine Workers of America.

8. The plaintiff and the defendants have entered into, and are parties to and bound by, that certain collective bargaining contract known as the "National Bituminous Coal Wage Agreement of 1971," which said contract became effective on November 12, 1971, and has remained in full force and effect to this date. A copy of said contract is attached hereto as Exhibit "A", and by this reference is made a part of this complaint.

9. Said National Bituminous Coal Wage Agreement of 1971 binds the coal operators signatory thereto, including the plaintiff to provide prescribed wages, hours, and conditions of employment for their employees during the life of said contract; and, in consideration thereof, said contract binds the employees of the said plaintiff who are represented by the defendant labor organizations, to perform work and services for said plaintiff, as scheduled by the plaintiff, in accordance with said contract, without engaging in strikes or work stoppages; and further binds the said defendants, their officers, agents and representatives to cause and require the performance of said contract by their members and em-

ployees represented by them, and to maintain the integrity of said contract.

10. Said National Bituminous Coal Wage Agreement of 1971 contains specific provisions respecting the settlement of differences, disputes, or grievances, between the parties, which said provisions read as follows:

"ARTICLE XVII—SETTLEMENT OF DISPUTES

"Section (a) Mine Committee

"A committee of three employees shall be elected at each mine by the employees at such mine. Each member of the mine committee shall be an employee of the mine at which he is a committee member, and shall be eligible to serve as a committee member so long as he continues to be an employee of said mine. The duties of the mine committee shall be confined to the adjustment of disputes arising out of this agreement that the mine management and the employee or employees have failed to adjust. The mine committee shall have no other authority or exercise any other control, nor in any way interfere with the operation of the mine; for violation of this section any and all members of the committee may be removed from the committee. (1941)

"Section (b) Grievance Procedure

"Should differences arise between the Mine Workers and the Employer as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or, should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time. (The parties will not be represented by legal counsel at any of the steps below.):

"(1) By the aggrieved party and his foreman who shall have authority to settle the complaint. Any grievance which is not filed by the aggrieved party within fifteen calendar days after he reasonably should have known of such grievance shall be considered invalid and not subject to further prosecution under the grievance machinery.

"(2) If no agreement is reached, the grievance shall be taken up by the mine committee and the mine management within five calendar days of the conclusion of step 1. A standard grievance form shall be completed and jointly signed by the parties to the grievance. Such a form will be agreed upon by the parties.

"(3) If no agreement is reached, the grievance shall be taken up by the UMW district representative of the Employer within ten calendar days of the conclusion of step 2.

"(4) If no agreement is reached, the grievance shall be taken up by the Board within ten calendar days of the conclusion of step 3 or in discharge cases within five calendar days of notice of appeal. The Board shall consist of four members, two of whom shall be designated by the Union and two by the Employer. Neither the Union's representative on the Board nor the Employer's representatives on the Board shall be the same persons who participated in steps 1, 2, or 3 of this procedure.

"(5) Should the Board fail to agree the matter shall, within ten calendar days after decision by the Board, be referred to an umpire who shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and fees incident to the services of any umpire shall be paid equally by the Employer or Employers affected and by the Union.

"The grievant shall have the right to be present at each step, if he so desires, of the foregoing procedures until such time as all evidence is taken. A decision reached at any stage prior to step 5 of the proceedings above outlined shall be reduced to writing and signed by both parties. The decision shall be binding on both parties and shall not be subject to reopening except by mutual agreement."

11. Said National Bituminous Coal Wage Agreement of 1971 contains the further specific provisions which reads as follows:

"ARTICLE XX—MAINTAIN INTEGRITY OF CONTRACT

"The United Mine Workers of America and the Employers agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Disputes" article of this agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract and by collective bargaining without recourse to the courts."

12. Said National Bituminous Coal Wage Agreement of 1971 contains further specific provisions respecting the settlement of safety and health questions and disputes, which read as follows:

Section (g) Mine Health and Safety Committee Inspections

(1) The mine health and safety committee may inspect any portion of a mine and surface

installations covered therewith. If the committee believes conditions found endanger the lives and bodies of the employees, it shall report its findings and recommendations to the Employer. In those special instances where the committee believes an imminent danger exists and the committee recommends that the Employer remove all employees from the involved area, the Employer is required to follow the recommendations of the committee.

(2) While making inspections, the mine health and safety committee shall be accompanied by a representative of the Employer.

(3) If the mine health and safety committee in closing down an area of the mine acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the health and safety committee under this section shall be handled in accordance with the provisions of article XVII entitled "Settlement of Disputes".

(4) The mine health and safety committee and the Employer shall maintain such records concerning inspections, findings, recommendations, and actions relating to this provision of the agreement as may be required and copies of all reports made by the mine health and safety committee shall be filed with the Employer.

Section (h) Settlement of Health or Safety Disputes

When a dispute arises at the mine involving health or safety, an immediate, earnest and sincere effort shall be made to resolve the matter through the following steps:

(1) By the mine management and the mine health and safety committee.

(2) By the United Mine Workers of America district safety coordinator or an alternate designated by the United Mine Workers of America Safety Director and a representative designated by the Employer. Failing to resolve the issue, they shall immediately call in for consultation a representative of the United States Bureau of Mines and/or the appropriate state agency in a further attempt to resolve the issue.

(3) By the United Mine Workers of America Safety Director or his representative and a representative designated by the Employer.

(4) By the Joint Industry Health and Safety Committee which for the purposes of this step shall employ a special structure and procedures as set forth below:

(A) The six regular committee members shall select a neutral chairman having special knowledge in matters of coal mine health and/or safety. The selection must be made immediately following referral of a dispute. The regular committee shall adopt procedures that will insure such timely selection.

(B) The neutral chairman and either four or six regular members equally representing the United Mine Workers of America and the Employers shall constitute a quorum. When a dispute involves health issues, two of the regular members must be those designated in section (e) hereof who have special knowledge and expertise in coal mine health matters.

(C) Decisions shall be reached not later than five days following referral to the committee. Such decisions shall be by majority vote and shall be binding upon the parties involved in the dispute.

* * *

14. The said National Bituminous Coal Wage Agreement of 1971, including the terms and provisions hereinabove set forth, requires that all local and district differences and disputes of any kind or nature, or local trouble of any kind, between the plaintiff and its employees, and between the said plaintiff and the defendants be handled exclusively and settled peacefully through the grievance and arbitration procedures therein provided; and prohibits strikes and work stoppages as a means or method of attempting to settle any disputes.

15. Preceding the making and entering into of the said National Bituminous Coal Wage Agreement of 1971, the plaintiff, and the defendants had been parties to the National Bituminous Coal Wage Agreement of 1968, a copy of which is attached hereto as Exhibit "B", and by this reference made a part hereof, covering employees at said plaintiff's mines, which contract contained provisions which likewise required the said defendants and the employees represented by them to settle all disputes and differences and local or district disputes and all trouble of any kind at plaintiffs mines and related facilities through the grievance and arbitration procedures provided therein; and which contract likewise prohibited the said labor organization defendants and the employees represented by them from engaging in strikes and work stoppages as a means of attempting to settle such disputes and differences, and which contract likewise carried forward said provision of the Kanawha District Agreement.

16. The said National Bituminous Coal Wage Agreements of 1971, and 1968, were entered into by the plaintiff in good faith with the object and purpose of obtaining the regular, dependable and uninterrupted work and

services of its employees represented by said defendants and establishing stability and peace in their labor relations; and the expectation thereof was the principal if not the sole consideration for plaintiff's entry into said contracts.

17. Notwithstanding the terms and provisions of said past and present contracts, and the provisions therein contained for peaceful settlement of disputes, differences and local trouble of any kind between the parties, and prohibiting strikes and work stoppages, the defendants, their officers, agents, representatives, and plaintiff's employees represented by them, have for a long time followed a pattern, practice, and course of action of refusing to submit such disputes, differences and local troubles at the plaintiff's mines or related facilities to peaceful settlement through the grievance and arbitration procedures provided by said contracts, and have repeatedly threatened to engage in, and have engaged in, strikes and work stoppages with an object to force and require the plaintiff to settle such disputes and differences in accordance with the demands of the defendants and plaintiff's employees represented by them, in violation of said contracts.

Portions of Defendants' Answer

IN THE

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

CARBON FUEL COMPANY,

Plaintiff,

vs. Civil Action No. 74-152 CH

UNITED MINE WORKERS OF AMERICA; DISTRICT NO. 17, United Mine Workers of America; LOCAL UNION NO. 6572, United Mine Workers of America; LOCAL UNION NO. 7626, United Mine Workers of America; and LOCAL UNION NO. 2236, United Mine Workers of America,

Defendants.

ANSWER

NOW COMES defendants, International Union, United Mine Workers of America; District No. 17, United Mine Workers of America; Local Union No. 2236, United Mine Workers of America; Local Union No. 6572, United Mine Workers of America; and Local Union No. 7626, United Mine Workers of America, by counsel, and make the following Answer to Plaintiff's Complaint.

First Defense

1. Defendants deny the averments of paragraph 1 of Plaintiff's Complaint.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 2 of Plaintiff's Complaint.

3. Defendants admit the averments of paragraph 3 of Plaintiff's Complaint.

4. Defendants deny the averments of paragraph 4 of Plaintiff's Complaint which state:

> and is an administrative division and agency of the defendant,

which state

> In all things hereinafter alleged, the defendant, District No. 17, United Mine Workers of America, has acted within the scope of and pursuant to its agency relationship to the defendant United Mine Workers of America,

and Defendants admit the remaining portions of said paragraph 4.

5. Defendants deny the averments of paragraphs 5, 6 and 7 of Plaintiff's Complaint which state:

> and is an administrative division and agency of the defendants, United Mine Workers of America, and District 17, United Mine Workers of America

which state in substance:

> In all things hereinafter alleged, the defendant Local Union Nos. 2236, 6572 and 7626 have acted within the scope of and pursuant to its agency relationship to the defendants District No. 17, United Mine Workers of America and United Mine Workers of America,

and, Defendants admit the remaining portions of said paragraphs 5, 6 and 7.

6. Defendants deny the averments of paragraph 8 of Plaintiff's Complaint, inasmuch as a copy of said agreement was not attached to the service copy of plaintiff's Complaint.

7. Defendants deny the averments of paragraph 9 of Plaintiff's Complaint which state:

> said contract binds the employees of the said plaintiff who are represented by the defendant labor organizations, to perform work and services for said plaintiff, as scheduled by the plaintiff, in accordance with said contract, without engaging in strikes or work stoppages; and further binds the said labor organization defendants, their officers, agents and representatives to cause and require the performance of said contract by their members and employees represented by them, and to maintain the integrity of said contract.

and Defendants admit the remaining averments of paragraph 9.

8. Defendants admit the averments of paragraphs 10, 11 and 12 of Plaintiff's Complaint.

9. Defendants deny the averments of paragraphs 13, 14 and 15 of Plaintiff's Complaint.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 16 of Plaintiff's Complaint.

11. Defendants deny the averments of paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 of Plaintiff's Complaint.

Second Defense

The National Bituminous Coal Wage Agreement of 1971 and the National Bituminous Coal Wage Agreement

of 1968 do not expressly or impliedly prohibit work stoppages during the course of said Agreements. Therefore, this Court lacks jurisdiction under Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C.A. Section 185, and the Complaint fails to state a claim on which relief can be granted against Defendants.

Third Defense

The work stoppages alleged in the Complaint were not called, authorized or ratified by any of the parties defendant. On the contrary, the work stoppages were wildcat strikes and defendants may not be held responsible therefor.

TRANSCRIPT OF PROCEEDINGS

Testimony of Plaintiff's Witnesses

L. Newton Thomas

71 DIRECT EXAMINATION

BY MR. ROLES:

Q Mr. Thomas, where do you reside?

A Charleston, West Virginia.

Q What is your occupation, sir?

A I'm Senior Vice President of Coal Operations for Carbon Fuel Company.

Q How long have you held that position?

72 A Since 1974.

Q During the period 1969 through 1973, were you employed by Carbon Fuel Company?

A I was.

Q What were your duties and responsibilities during that period of time?

A I was Assistant Manager of Mines and Vice President of Planning and Development.

Q In that capacity, were you generally aware of the operations of Carbon Fuel, the actions which it took during that time?

A I was.

Q What is Carbon Fuel Company?

A Carbon Fuel Company is a company that produces coal for various markets, using various ways to mine coal and prepare coal for the market.

Q Is it engaged under the name of Carbon Fuel Company in any other business?

A No, it is not.

Q Where are its operations located?

A Its operations are entirely in West Virginia and, essentially, Kanawha and Boone County; Carbon Division being on Cabin Creek and the Winifrede Division being on Fields Creek.

* * *

73 Q How Long has Carbon Fuel Company been in existence?

A Since 1902.

Q And what business has it engaged in since that time?

A Coal mining.

Q I take it that Carbon Fuel Company has a collective bargaining arrangement with the United Mine Workers of America?

A It does.

Q When did it commence having such an arrangement or when did it first recognize United Mine Workers of America as the collective bargaining agent for its employees?

A In the early 1930's period.

Q Has there been a period since that time when Carbon Fuel has not recognized the International Union, United Mineworkers of America?

A There has not been.

Q What association of coal operators does Carbon Fuel belong to for the purpose of bargaining with the United Mine Workers of America?

74 A The bargaining union for national wage agreement is the Bituminous Coal Operators Association.

Q What is the Bituminous Coal Operators Association?

A It's an association of coal-producing companies who join together for purposes of negotiating a wage agreement.

Q Do they negotiate different wage agreements affecting the different mines involved or do they negotiate one agreement?

A Essentially one agreement for bituminous coal mines.

Q All right. Now does Carbon Fuel belong to another association for the purpose of dealing with the mine workers?

A Yes. Kanawha Coal Operators Association, which is an association of coal operators in the Kanawha Valley, essentially Kanawha Valley area; and they perform services for the company in the arbitration—in the administration of the grievance and arbitration procedure under the contract.

Q I believe you testified that, during the period 1968 through 1973, Carbon Fuel had operations at its Winifrede and Carbon Divisions. What operations did it have in its Winifrede Division?

A Winifrede Division, it had several deep mines and two surface mines over that period; five mines in total.

Q What were the names or numbers of those mines in the Winifrede Division?

A Number 6 mine; Number 31 mine; Number 34, otherwise known as the Morton Mine: Number
75 18 mine; and Number 38 mine.

Q What local union of United Mine Workers of America represented the employees of the Winifrede Division?

A Local Number 2236.

Q I omitted to ask this question. What district of the United Mine Workers of America represents all the employees of both divisions?

A District 17.

Q What mines did you have in the Carbon Division during this period of time?

A Carbon Division, we had approximately ten mines over that period.

Q Were there more than one local union representing employees at those mines?

A There were two, yes.

Q All right. Would you tell me first of all what Local or what the numbers of those Local Unions are?

A 6572 and 7626.

Q What mines and related facilities were served by Local Union 6572?

A The Number 9 mine, and a cleaning plant connected thereto, Number 27, 28, 29 and 39 mine.

Q All right. And what Local—what mines did Local Union 7626 represent?

76 A Number 7, Number 20 or 20-A as pointed out earlier. Number 36 and Number 41 and Number 24.

Q I take it, other than the mines themselves, there are a number of related facilities for those mines in the Carbon and Winifrede Division?

A There are.

Q Would you tell the ladies and gentlemen of the jury what those related facilities are?

A Well, at each division area, there is a central cleaning plant, which processes the coal, prepares it for market and separates the unmarketable material from the coal. There is a shop, a rebuilding shop at each of the facilities. There are outside crews connected with each of the two divisions that handle the outside maintenance and construction work.

Q What sort of construction and maintenance work are you talking about?

A Essentially mine-related small construction jobs, road repair work, small buildings, repair shop buildings.

Q During the period 1968 through 1973, what was the approximate annual production of Carbon Fuel Company at both its divisions?

A Averaged over that period about 2.2 million tons a year.

Quin Morton III

81 Q Where do you reside, Mr. Morton?

A 1615 Woodvale Drive, Charleston, West Virginia.

Q By whom are you employed?

A Kanawha Coal Operators Association.

Q What position do you hold with Kanawha Coal Operators Association?

A Executive Secretary.

Q How long have you held that position?

A Since April 1959.

Q What was your occupation and employment prior to becoming Executive Secretary of the Kanawha Coal Operators Association?

A Immediately prior to coming with Kanawha Coal Operators Association, I was manager of two mines, one in southern West Virginia and one in southwest Virginia.

Q How long all together have you been em-
82 ployed in the coal mining industry?

A Since 1931.

Q What is the Kanawha Coal Operators Association?

A Kanawha Coal Operators Association is an association that is incorporated, that is made up of coal producing companies and a few service companies, that primarily deals with the application of the National Bituminous Coal Wage Agreement and the grievance procedure under that agreement.

Q How long has Kanawha Coal Operators Association existed?

A Kanawha Coal Operators Association was formed in 1905.

Q Where is its present headquarters or office located?

A It's at 809 Kanawha Valley Building, Charleston, West Virginia.

Q Is that where you have your office as Executive Secretary of the Association?

A Yes, that's where my offices are.

Q Are the members of the — I believe you said the members of the Association are engaged in the coal mining industry, is that correct?

A That's correct.

Q At the present time, what is the approximate number of coal companies that are members of
83 the Kanawha Coal Operators Association?

A We have thirty-two members now.

Q Are you familiar with the period of time in the industry that was covered by the National Bituminous Coal Wage Agreements of 1968 and 1971?

A Yes.

Q During the periods of time covered by those National Bituminous Coal Wage Agreements, what was the approximate number of members of the Kanawha Coal Operators Association?

A Since I have been with the Association, in 1959 and before, the number of members has ranged from approximately twenty to thirty-four.

Q Does the Kanawha Coal Operators Association function and represent members in any particular segment or geographic area of the coal industry?

A The Kanawha Coal Operators Association membership is in Kanawha and Boone Counties. We have a few mines in Logan County, a few mines in Raleigh County and a few mines in Fayette County. And we have a mine in Mason County. I believe that is the counties we operate in at the present time.

Q Are you able to say approximately how many the total number of coal mines operated by members of the Kanawha Coal Operators Association during the period covered by the 1968 and the 1971 agreements?

84 A I would say the number of mines, separate mines being operated by the membership during that period would range from approximately seventy-five to ninety mines.

Q Can you state for us approximately what the total tonnage of coal production annually those mines and those companies that are members of the Association represented during that period of time?

* * *

A Since I have been with the Association the tonnage has ranged from twelve million tons per year to sixteen million tons per year.

Q Are you able to state what was the approximate total number of employees of the member companies of Kanawha Coal Operators Association during the span of time covered by the 1968 and 1971 coal wage agreements?

A It would range approximately from forty-five hundred to five thousand employees for the member companies.

Q Is the Carbon Fuel Company — I believe it's already in evidence — a member of the Kanawha Coal Operators Association?

85 A Yes, they are.

Q Are you able to say how long it has been a member of that Association?

A To my personal knowledge, it was from 1959 to the present. However, I know they were members many, many years before that, based on the records of the Association.

Q State whether or not all of the production and maintenance employees of all of the coal company members of the Kanawha Coal Operators Association are represented by the United Mine Workers of America for purposes of collective bargaining with their employers.

A All of the employees employed by the coal producers, members of Kanawha Coal Operators Association, belong to the United Mine Workers.

Q Does that situation, however, except supervisors and management employees?

A That, of course, except the supervisory or exempt employees.

* * *

86 What is the practice in that regard with respect to whether or not they are members of the United Mine Workers—that is, those who are production and maintenance employees?

A The contract clearly sets out that except for those people particularly exempt will be members of United Mine Workers except as exempt by law.

* * *

88 Q Are the members of Kanawha Coal Operators Association parties to labor agreements with the United Mine Workers of America?

A They are.

Q How long have the members of the association been parties to the National Bituminous Coal Wage Agreement with the United Mine Workers?

A Since 1941. * * *

Q All right. Now, is it true that for some years, perhaps a relatively short period of time, following 1941, there were separate wage agreements with the United Mine Workers and the so-called southern operators and northern operators in the coal industry?

A Yes. There were two wage agreements made, although they were very similar, from 1941 to, I believe, about 1948.

Q Since 1948 what has the situation been with respect to the agreement to which the members of the Kanawha Coal Operators Association are parties with the United Mine Workers of America?

A About 1948 the Bituminous Coal Operators Association was formed and might be described became the

principal bargaining unit with the United Mine Workers for a national agreement, although the Southern
89 Coal Producers Association, which was in existence prior of that time and had been bargaining contracts with United Mine Workers, continued as a bargaining unit.

For all practical purposes, United Mine Workers and Bituminous Coal Operators Association, from 1948 on forward, negotiated the contract and it was presented to the Southern Coal Producers group for signature. And for that matter, the rest of the coal industry that signed the wage agreement.

* * *

94 By whom are the National Bituminous Coal Wage Agreements negotiated?

A The National Bituminous Coal Wage Agreement is negotiated by a negotiating team or party that is appointed by the Directors of BCOA.

Q And who negotiates on the union side?

A Persons appointed by the International Union.

Q Are the national agreements negotiated at the national level by the Bituminous Coal Operators Association and the International Union of the Mine Workers?

A That is correct.

Q And how long has that been so?

95 A It has been so—it has been a practice since the early part of the 1940's, as far as BCOA and the International is concerned, since about 1948 or '50.

* * *

Q I see. Was Carbon Fuel Company a member of BCOA at the time of the 1968 and '71 agreements?

96 A Yes. They were a member of BCOA through their membership in Kanawha and Southern Coal Producers Association.

Q What is Southern Coal Producers Association?

A Southern Coal Producers Association is an association formed in 1941 as a bargaining representative for a group of southern coal companies and continued in a negotiating capacity for agreements until 1968, when it became a member of the Bituminous Coal Operators Association.

Q Who signs the national agreements on behalf of the mine workers?

A In the 1968 agreement or the 1971 agreement, I believe Mr. Boyle's name appeared. Mr. John Owens' and George Titler's names appeared.

Q And who were Mr. Boyle, Mr. Titler and Mr. Owens?

A Mr. Boyle was the President of the United Mine Workers. Mr. Titler was Vice-President and Mr. Owens was Secretary-Treasurer.

Q Was that the same situation with respect to both the '68 and '71 agreement?

A Yes, sir. And in each of those agreements, I believe, there were listed certain Mine Workers people who had been listed — who were on a bargaining committee or some type of bargaining group. Unfortunately, these don't have them listed — a list of the bargainers here, a list of the people who signed it.

97 * * *

Q Sir, I would ask you if you can state which

echelon or division of the United Mine Workers Association is the bargaining agent to bargain with the operators on behalf of its members?

A International Union

Q And to what organization or echelon of the United Mine Workers do the members of the union belong? Do they belong to the International Union?

A Do the membership of the union belong?

Q Yes, the individual members of the Mine Workers.

A They belong to the United Mine Workers of America.

Q That is what? The name of what? The International?

A International Union.

* * *

99 A Carbon Fuel Company's membership in BCOA is through the Kanawha-Southern associate membership.

Q And when you speak of Kanawha-Southern, are you saying that Carbon belongs to the Kanawha Operators Association, which in turn belongs to the Southern Coal Producers Association, which in turn belongs to the BCOA?

A That's correct.

Q Is the United Mine Workers Organization also divided and sub-divided into sub-divisions which operate in particular geographic areas?

A Yes, that's true.

Q And which district is operative in the area of the mines of the members of the Kanawha Operators Association?

A District 17.

Q Do you know how many UMW Districts there are all together?

A Twenty or twenty-two. I'm not positive of that.

* * *

139 Q Let me ask you this, Mr. Morton, during the period of time we are talking about under the 1968 and 1971 contracts, did you receive reports from your members with respect to strikes in the Kanawha Association?

A Yes. During that period, a company having a strike would call in and report when the strike started. If he knew what was the reason for the strike, he would report it. If there were pickets present, he would report that. Give me some general information. We would log that information in, and I can't say that every company called in every strike. But they did call it in; we did make a record of it that was finally put into a recap form at the end of the year so that we would have some general idea, or reasonably good idea, of the number of days lost and the number of strikes during that period.

Q Did you, at my request, review the recap records that you refer to for the purpose of determining the number of strikes and the number of days lost through strikes?

A Yes, I did. During that period of time, there were a number of strikes reported that occurred during the period of negotiation that I deducted those strikes from this recap

140 Q You mean you have excluded any strike time lost in connection with strikes over the negotiation of new contracts?

A That's correct.

Q Now, the information which you are now giving at my request on the stand, was this based upon your review of these reports and records that you have described?

A Yes.

Q I believe you said that perhaps not all the strikes that occurred were reported to you?

A That's correct.

* * *

144 Mr. Morton, I'm not entirely clear just where I left off, but I believe I asked you if you could tell us the number of strikes for the fiscal year, '68-'69 among members of the Kanawha Coal Operators Association?

A That was during '68-'69, it was seventy-one strikes and eight hundred and nineteen mine days.

Q Do you have similar information with respect to the fiscal year 1969-70?

A Yes, sir.

* * *

145 Q I don't believe that you answered my question as to the number of strikes in the fiscal year, 1969 and '70.

A Sixty strikes; three hundred and seventy-one and two-thirds mine days lost.

Q And with respect to the fiscal year, 1970-71, what was the number of strikes?

A Two hundred and sixteen strikes, four hundred and twenty-nine mine days, and two-thirds. That
146 was two shifts over.

Q Was that figure again?

A Four hundred twenty-nine and two-thirds mine days lost.

Q And with respect to the fiscal year, 1971-72?

A We did not make a recap for the strikes during that year and I don't have the figures available.

Q Did you not make one, or can you not find the records?

A I couldn't find it, so I assume we didn't make it.

Q What about 1972 and '73?

A 1972 and '73 we showed a hundred and sixty-three strikes; five hundred and sixty-three and two-thirds mine days lost.

* * *

147 Q When you received, at your office, the reports of strikes at mines of your members, what did you do upon receiving that information?

A Generally, either myself—if I'm available, I do it—I call the district office, and notify usually Mr. Perry. If Mr. Perry isn't there, maybe Joe Duffy, the Secretary-Treasurer, I believe is his title. If he isn't available, one of the field workers or district representatives who services that particular mine or local union.

Q During the term of the 1968 and 1971 contract, did you communicate the information with respect to strikes to District 17?

148 A Either myself or someone on my staff attempts to communicate any strike communication we get to District 17.

Q Did you do that many times yourself individually?

A I did that many times myself individually.

Q To whom did you communicate the knowledge and information with respect to the strike at District 17?

* * *

A Now. Prior to that time, it was Mr. Humphreys; Mr. Humphreys, Mr. Ellis or some of the field workers. Usually when I communicate, I try to communicate with the District President. If he's not available, one of the district representatives who services that particular mine or local union.

Q What time or times of day did you ordinarily receive the strike reports from your members?

149 A Well, I could receive them sometime between eight-thirty and nine-thirty in the morning. Not always in that period of time. Sometimes they didn't call me till later. But usually it was during that period.

I have received them at home. I have received them in the late afternoon at the office, when I am there. I sometimes receive them at home.

Q What time interval was normally involved between the time of your receipt of the report of the strike and your communication of that information to the District?

A If it is in the morning, as soon as—if there are several mines apparently on strike, I try to run the whole thing down and then report. If it's just one mine or two mines, immediately on getting the report, we call someone at the District office.

Q What time interval—

A In the afternoon, say, from three to four or five o'clock, generally the miners office is closed after four-thirty, I have caught people there after that and reported a strike, and many times I have called a field rep. at his home and reported a strike.

Q Are you able to say what the normal interval of time was between your receipt of information and the time you got it to the District?

150 A Usually within the hour.

Q What information did you give to the personnel at District 17 when you communicated information concerning strikes to them?

A Well, when we would get a strike report, we would try to find out all we can about it. Whether there were pickets; whether they were local pickets or stranger pickets; why the strike occurred, if they knew why it occurred; if they had a grievance pending that they were unhappy about; or basically what might have caused the strike so I can communicate it with the District personnel.

Q Did you at the time you advised them that the mine was on strike, ask the District person that you were speaking to that the District take any action or do anything specific with respect to the situation?

A Sometimes I will ask them, "Are you going to get on this? Are you going to do anything, or will you please see if you can get the mine back to work? Or will you check into this and see if there is any way we can help? But let's get going. Let's get the mine back to work."

Never any fixed pattern of what I say, but the suggestion is always there, let's get the mine back to work.

Q Now, specifically, did you receive this type of information regularly, during the time of the 1968 and
151 '71 contracts, from Carbon Fuel, as well as from other members?

A Oh, yes.

* * *

Q How long has this practice of receiving strike reports and transmitting them to the District been in effect or application at Kanawha Operators, to your knowledge?

A Apparently it was in effect prior to my reaching—or my coming to the Association. However, it has been a practice ever since I became a member of the Association staff.

Q And that is since 1959?

A 1959.

Q Have you had conversations with the District presidents and District representatives concerning certain strikes after you had reported the existence of the strike to the District?

A Yes. Usually during a period of strike when the mines are down, I will contact somebody at the District office during the course of the strike. And find out—try to find out what they are doing about it or
152 find out if there is any information that they have gleaned that might be helpful to me.

Q What information has the District given you in connection with these communications as to what action, if any, they were taking? What response have you gotten from them when you ask them to get the mines back to work?

* * *

A Generally, when I call them, they say "We'll get right onto it and get somebody in the field and try to find out what the situation is." Often they would say, "We'll get a field rep. out to that area." Sometimes a field rep. will call back and say, "I've talked to the men and don't know what we can do about it." But they tell me they are going to take some action and send men out in the field to see what they can do.

* * *

153 Q Did strikes continue after you received that type of information from the District?

A Yes, they did.

Q Did District 17 or any representative of the District, or the International Union, for that matter, ever inform you of any specific action of any other kind that they had taken in connection with a strike either at Carbon Fuel Company or anywhere else?

* * *

A No.

Q Specifically, did the District, District 17 or
154 the International Union, ever inform you of any disciplinary action taken by the International Union or by District 17 against any local or any UMW member for engaging in strikes either at Carbon Fuel Company or at any other mine in the Association?

A No.

Q Has District 17 or the International ever informed you that the charter of any local union had been revoked or that any threat or action to revoke the local union charter had been taken or made because of any strike or strikes at Carbon Fuel Company or any other mine in the Association?

A No.

Q Have you ever been told in connection with any of these strikes by the International Union or by District 17 that either of them had taken any action under the UMW constitution to reverse any strike action by any local union in connection with any strike at Carbon Fuel Company or any other member mine in the Association?

A No.

* * *

155 Q I asked you if the District or International, at any time under the 1968 or 1971 contract, ever told you or informed you of any action taken by them to suspend or remove any UMW official or appointed employee for cause in connection with any of these strikes either at Carbon Fuel Company or at the mine of any other member of the Kanawha Association?

A No.

Q Has District 17 or the International Union ever informed you that any charges or proceedings have ever been initiated against any member or members engaged in any unauthorized work stoppage that resulted in a shutdown of either a Carbon Fuel Company mine or the mine of any other member of the Association?

* * *

156 A Not during the period of time we are discussing.

Q Has either the International or the District ever informed you that they had ordered their members to cross any picket line or to work despite the presence of pickets at any Carbon Fuel Company mine or any other mine of the Association?

A No.

* * *

BY MR. JOHNSON:

Q Have either the International or the District ever informed you or advised you of any disciplinary action taken within the Union against any picket in connection with any of these strikes or work stoppages at Carbon Fuel Company or at the mines of any other member of the Association?

* * *

157 A Not during the period of time we are discussing.

Q That is at any time covered by the 1968 or 1971 Bituminous Coal Wage Agreement?

A That's correct.

Q Has the District or International Union ever informed you or told you that they had ever told any of their members that any of these strikes that you have described, either at Carbon Fuel Company or at any other mine of a member of the Association, were violations of the contract?

A They have never told me that, no.

Q Have they told you—have they ever said anything to you about whether or not they were violations of the Union constitution?

A No.

* * *

159 Q Mr. Morton, did KCOA members report to the Association the names of pickets or individuals involved as instigators of any of the strikes when they made their strike reports to the association?

160 A In many instances — not all, but in many instances they did report the names of people whom various members of their organizations had identified on the picket line.

Q Did the Kanawha Coal Operators Association report that information to District 17 when it made the strike reports that you have described in your testimony?

A When we had the names of pickets, we did give those names to District 17.

Q Was that also true where people were identified and reported to you by the companies as instigators of strikes other than pickets?

A If the company reported to me that a person was the instigator of the strike, or they believed was the person promoting the strike, then I did report those names.

* * *

163 *Quin Morton, III*

CROSS EXAMINATION

* * *

Q You spoke in your testimony yesterday of the miners not being required to be members of the United Mine Workers of America until after the hiring.
164 Is that correct?

A That's the way I read the wage agreement.

Q As Executive Director of KCOA, do you know the practice in the industry of taking on new employees by your various members?

A Yes.

Q Isn't it true, as a matter of fact, that the method by which that is done is for the company itself to receive applications from prospective employees who will be covered, to screen them and evaluate them and then hire them, exclusive of any participation or activity by the United Mine Workers, the International, the District or the Local.

A A man approaches a coal company, an individual who wishes work, and in most cases they approach whoever is in charge of the employment service or the personnel relations at that mines.

Q Personnel manager or something?

A. Okay.

165 Q All right.

A Fills out a request for employment, discusses it with the superintendent or other personnel manager, and if the company, needing men, they usually have a physical examination in most cases — if he passes the physical examination, then they go through the general routine of signing them up for social security numbers and all that data that is necessary; and usually, at that time, they will ask the man — not require him, but ask him to sign what is known as a checkoff slip, which is a form, a checkoff form, that is required by the contract and the law, at which time a man signs for the checkoff of dues and initiation fees for the Mine Workers.

Under the terms of the contract the company is obligated to cooperate with the union in getting these checkoff cards signed.

Q In other words, the employment arrangement and practice does not anticipate the personnel officer at the coal company, or any of the company's officers calling the Local or the District and saying "We need three miners; send them out." There is not a hiring hall type of arrangement?

A There is not a hiring hall type of arrangement in the coal industry.

* * *

169 Q You said in your testimony yesterday, Mr. Morton, that the International or the District at no time told you a number of things about which Mr. Johnson asked. Is that correct?

A Yes.

Q And you said among other things that the International and the District never told you they took action to reverse a work stoppage. Do you remember so testifying?

A Yes.

Q Now, you do know, as a matter of fact, do you not, that when you contacted the District Office, you were told that they would take action immediately to get the men back to work. Is that not a fair statement?

A I think in every case or nearly every case, they would check into it and see what they could do to get the mine back at work.

Q And from your relation with the District during that period of time, you knew that they did take such action as quickly as possible to get the men back to work, did you not?

170 A I know that they sent District Representatives out to the mines, or at least I was told that they did. I was told they had meetings at the mines. On occasions I understand that the District President went to the mines. What action they took other than appearing at the mines and talking to the men, I do not know.

Q Well, I understand that. We are speaking now of what they told you they were doing just as Mr. Johnson asked what they told you, and they did tell you that, did they not?

A They did tell me that.

Q And is it not true, Mr. Morton, from your records, that many of the work stoppages which are the subject of this lawsuit were stopped and the men returned to work within, on some occasions, half a day?

A There were strikes that started that usually they were back — there was times when they were back in twenty-four hours. In recent months, there have been some times they were back after one shift, but —

Q Well, during the period 1969 through 1973, let's confine our answers to that period. That's the subject area of this lawsuit.

A Generally during that period, there were times — there were times during that period when the mines went back to work in twenty-four hours, if my memory serves me right. There were other times that
171 they went for several days before they returned.

Q I understand that. My question to you is, Mr. Morton, there were many instances when, after you made the report, you learned that the mine went back to work after a day, is that not correct?

A There were instances when they returned after a day.

* * *

172 Q No one ever told you that the International called such a work stoppage, did they?

A I don't recall except in the cases of the negotiating periods of the contract. I don't know of anytime — I can't recall anytime that the International authorized a strike.

Q They never told you at any time that the International Union authorized the strike, did they?

A To the best of my memory, no.

Q As a matter of fact, they told you that the International Union disavowed the strike, did they not?

A In many cases, they did.

Q Would you say that was in most cases?

A I would have to say in most cases.

Q And they told you that it was their goal to immediately set out to get the men to come back to work, did they not?

A They told me that they would go out and find out what the strike is about and endeavor to get
173 them back to work.

Q At no time in any of these conversations that you had with the District Office, did they tell you that the District called the strike, did they?

A I don't recall any instance where the District said they had approved the strike.

Q They didn't say they had called the strike, they didn't say they had authorized the strike, they didn't say they had approved the strike, did they?

A Not to my knowledge.

Q And, in fact, is it not true, Mr. Morton, that they disavowed the work stoppage?

A In many cases, they disavowed the work stoppage.

Q And would that not be true in most cases?

A Perhaps. I believe it would be most cases that they disavowed that the strike was authorized.

Q All right. They disavowed and disapproved the strike in all cases that you talked to them about, did they not?

A I wouldn't go so far as to say in all cases. I would say in many of the cases, or most of the cases, they did. I just can't honestly say they disavowed them in all cases.

Q But you can't think of a case in which they didn't disavow?

A Offhand, no.

174 Q All right, sir. In talking with District officers you were never told, were you, that the Local Union or Unions, because there were three local unions specially at the Carbon Fuel Mines, that the Local Union called the strike, did you, or were you? You were never told that the Local Union called the strike, were you?

A I recall many instances where in local union meetings, they had voted to strike.

Q Did you attend those local union meetings?

A No, I was told they had voted to strike.

Q But at the walkout, you were not told that they called a strike, were you? When you called the District Office and reported a work stoppage, you were never told that the District called the strike, were you?

A That the District called the strike?

Q Excuse me, that the Local or any one of the three?

A I don't recall ever being told that the local had called the strike.

Q All right. Now, let me be more particular. With reference to the work stoppages that are the subject matter of this lawsuit, beginning as alleged in 1969 and continuing through 1973, if I ask you regarding those stoppages during that period, and each and every one of them, if your answers given last to me regarding the calling or the authorization or the approval of
175 those stoppages was ever supplied to you by way of information with regard to the International or the District or the Local, would your answers be the same as to those work stoppages which are the subject matter of this lawsuit? Which is to say — maybe it's a bit confusing. Let me clarify it for you. This lawsuit covers a number of work stoppages. There was no time, regarding any of these work stoppages, that you were told that the International called or authorized or approved the strike?

A I don't recall anytime I was told the International approved or authorized a strike during this period on strikes that are subjects of this matter.

Q And that would be true likewise of the District? You were never told that they were authorized or approved?

A I don't recall of any instance where the District told me they approved of a strike.

180 *Daniel L. Toney*

Q Are you employed by the Carbon Fuel Company?

A Yes, I am.

Q What position do you hold?

A Personnel Director.

Q How long have you held that position?

A July of '63.

* * *

182 Q Now you have — are you generally familiar with the manner in which the grievance procedure operated during the '68 and '71 agreements?

A Yes, sir.

Q How did you become aware of that?

A Well, through the contract.

Q And did you also advise employees of Carbon Fuel as to handling of grievances at the first and second steps?

A Yes, sir.

Q How many — very briefly — how many steps were there during those two contracts in the grievance procedure?

A Five.

Q The first two of those steps were handled at the mine level, were they not?

A That's correct.

Q Under the '68 agreement, between who were the first two steps handled?

183 A Repeat that.

Q Under the '68 agreement, who were the parties or who were the individuals involved in the first step?

A The first step was between the grievant and mine management.

Q And who would mine management normally be?

A The supervisor at the mine.

Q Could it be the immediate supervisor or would it be someone else?

A It could be either.

Q At the first step of the grievance procedure, are you aware of any action taken either by the International or District Unions during the '68 and '71 agreements?

A No. sir.

Q The man himself was permitted to handle it as he saw fit?

A That's right.

Q Who were the parties involved at the second step of the grievance procedure?

A Mine management, the grievant and the mine committee.

Q Very briefly, what is the mine committee?

A The mine committee is a group of usually three men that are selected to represent the mine to handle grievances.

184 Q By whom are they selected?

A By their local union.

Q Is it by appointment or election?

A By appointment.

Q Would it occasionally be by election?

A It could be. I'm not sure.

Q Okay. And who represented, at the second step, the company?

A The mine superintendent.

Q At the mine involved?

A At the mine involved. He and the immediate foreman.

Q Now are you aware of any action by the District or International with regard to this step of the grievance procedure?

A No, sir.

Q At the third step, who represented the union?

A A field representative from District 17.

Q And this is an employee of District 17?

A Yes.

Q And who represented the company?

A A labor commissioner from KCOA.

Q Did the District play any part in Step Three, other than representing the union at that time?

A No.

185 Q Did the International play any part during the grievances, that you are aware of, at Step Three?

A No, sir.

Q As to Step Four, who represented the Union?

A The representative from District 17.

Q This is the joint board step, is it not?

A That is correct.

Q And the Board is composed of whom?

A Two members from the union and two members from management.

Q And what is the Board's function at Step Four?

A Just to try to settle the case.

Q Is the case presented to the Board by the respective sides?

A Yes, it is presented by the representative of the union that made the record in Step Three, and the representative from management that made the record in Step Three.

Q What does the presentation consist of? What do they do?

A They present the case to the Joint Board.

Q Do they argue the facts of the contract application for their side?

A Yes, sir.

Q Does the International, or did the International take any part in the fourth step of the grievance
186 procedure during this period of time?

A No, sir.

Q What is the fifth step of the grievance procedure?

A That's where the case was taken to arbitration.

Q And what happens basically in that?

A The union and management present the case to an arbitrator for their decision.

Q Is this done by oral argument or was this done by oral argument or by brief?

A By brief.

Q And it was argued upon the record made earlier in the procedure?

A That's correct.

Q Who prepared the brief for the union?

A A representative from District 17.

Q And who prepared the brief for the company?

A Kanawha Coal Operators Association.

Q Did the International play any part in this part of the grievance procedure during that period of time?

A No, sir.

Q In all steps of the grievance procedure, at this time, as it relates to Carbon Fuel, are you aware of any action by the International Union?

187 A No.

Q In the first steps of the grievance procedure, as it relates to Carbon Fuel, are you aware of any action by the District Union?

A No, sir.

* * *

304 Q Mr. Toney, now that you have described those strikes, we will move on to another area in your testimony.

When a strike was reported to your office, what was your procedure after that strike had been reported to your office?

A To notify Kanawha Coal Operators Association and BCOA.

Q Did you, during this entire period of time, regularly and systematically notify Kanawha Coal Operators Association of the existence of strikes?

A Yes.

Q When did you notify them? Well, let's suppose the strike began on the midnight shift. When would you notify Kanawha Coal Operators Association?

A If it began on the midnight shift, it would be usually after eight o'clock in the morning.

305 Q And if it began on the B shift, or the morning shift, which begins between seven and eight, when would you notify Kanawha Coal Operators Association?

A Probably sometime after eight o'clock.

Q If it began the afternoon shift which begins between three and four o'clock, when would you notify Kanawha Coal Operators Association?

A Sometime after four, shortly after four.

Q Do you know of any instance in which a strike occurred at any of your mines of which Kanawha Coal Operators Association was not notified in accordance with this procedure?

A No, sir.

Q Mr. Toney, in your position as Director of Personnel for Carbon Fuel, have you kept close tabs upon the occurrences during strikes at your mines?

A Yes, sir.

Q What efforts do you know of of the International Union, that the International Union has taken, to either prevent the strikes or to bring them to a halt?

A None.

Q What action do you know of of the District Union either to prevent these strikes or to bring them to a halt once they have begun?

A None.

306 Q What action do you know of taken by the Local Union either to prevent these strikes or to bring them to a halt?

A None.

* * *

Q During the time covered by this complaint, did Carbon Fuel make any efforts to identify strike leaders and pickets?

* * *

A Yes.

* * *

307 Q Is there any policy with Carbon Fuel Company with regard to the reporting of the identities of strike leaders and pickets?

* * *

A Yes, our foremen or any supervisory person connected with the mines are to notify the mine manage-

ment or the management of any pickets that they recognize. They also take down any license number, description of the automobile or anything that they can use to identify someone who has picketed our operation.

Q Is that — state whether or not that information is supposed to be, or is reported to you?

308 A Yes.

Q Has it, or was it, during this period of time, occasionally reported to you?

A Yes.

Q What did you do with that information when it was reported to you?

A Notified Kanawha Coal Operators Association.

Q And for what purpose did you notify Kanawha Coal Operators Association?

A For them to furnish this information to the District.

* * *

Q Do you know of any action by the International, District or Local Unions taken upon the information which you provided?

A No, sir.

* * *

373 *Daniel L. Toney* — CROSS EXAMINATION

Q Mr. Toney, in your testimony, you have said that you knew of no efforts ever taken by the local union or local unions to cause the work stoppage to come to an end. Is that what you said?

A Yes, sir.

374 Q Have you not been aware, personally aware, of meetings that local union presidents have had at mine sites with the employees in an effort to get them back to work?

A I have.

Q Have you not —

A I've known of them to have meetings. As far as getting them back to work — I don't know what goes on at the meetings.

Q Well, shortly after a work stoppage they would have a meeting, would they not, on many occasions?

A Yes, on many occasions.

Q And perhaps far more than you were personally aware of? Would that be a fair statement?

A Some.

Q And you don't know what happened at those meetings?

A No, sir, I have no way of knowing what happened at the meetings.

Q So you don't know what, if any efforts were made by the local officers, to get those mines back in operation at all then, do you?

A No.

Q Were you ever aware of the fact that district representatives went to any of these meetings and ordered the men back to work?

375 A I know that they did go on occasions, go to the meetings on occasions.

Q But you don't know what happened at these meetings?

A No, sir.

Q These meetings were held at or near your office sometimes, were they not?

A Yes, they were.

Q And approximately how far from your office there would those meetings be held?

A Oh, a couple of hundred feet.

Q Many of the stoppages that you have identified in your numerous exhibits here, or plaintiff's numerous exhibits, were stoppages that came to an end after one shift or one day. Would that not be a fair statement?

A That's right.

Q Which means that the miners went back to work after having been out one shift or having been out a half a day or having been out a day or some such thing as that?

A Yes.

Q And on those occasions, there would be meetings of the local union at that situs some two hundred feet from your office at which something occurred, you don't know what, is that correct?

A Well, I can't say that they had a meeting
376 everytime they had a strike.

Q Well, I know, but you don't know that they didn't, do you?

A Well, in the Carbon Division, I would know most of the time.

Q And so far as you know, can you cite any strike that you have spoken of in these exhibits that did not result in the local meeting, either at the mine site two hundred feet from your office, or someplace else?

A No.

Q What you are saying, in essence, is that you don't know of your own personal knowledge whether or not the locals or the District or the International did anything? That's all you're saying? You just don't know?

A I don't know that they did anything to get the men back to work.

Q And whatever they did, you are not aware of it. Is that a correct statement?

A That's right.

* * *

580 *Joe Ellis*

Q Mr. Ellis, are you the Joe Ellis which the defendants in this case indicated they might call who was president of District 17 during much of the period in question?

A I am.

Q Mr. Ellis, when were you first associated with District 17?

A In May of 1960.

Q And what was your job with them at that time?

A I was hired as a representative in the Logan field. I spent about six weeks there and came to Charleston and was a district representative.

581 Q Did you work out of the Charleston office?

A Yes, I did.

Q Did you at a later time become president of District 17?

A I did.

Q What are the duties of the president of District 17?

A To supervise the representatives. You are in charge of the District period. To see that all of the unions are properly served and grievances—

Q In other words, the president is in charge of the District?

A Yes, he is.

Q When did you become president of the District?

A March 15, 1970.

Q And when did you leave as president of the District?

A I left, I believe, in the latter part of May, 1973.

Q During the period that you were associated with District 17, were you well aware of its methods of operation, its structure and its procedures?

A Yes.

Q During that period, how were the employees of the District, including the president, selected?

A We were appointed.

Q By whom?

582 A By the International Union President subject to the approval of the International Executive Board.

* * *

583 Q During that period of time, did the International Union have authority to direct all actions of the district if it chose to exercise it?

A Yes, it did.

Q Mr. Ellis, during that period of time was there a procedure in practice at the union whereby wildcats strikes occurring within the district were reported to the International Union?

A Yes, there was.

Q Would you describe that procedure to me, please?

A Generally if a company experienced an unauthorized work stoppage, they would call the district or if they belonged to an association, such as Kanawha Coal Operators Association, then someone from the association would call the district and advise us there was a work stoppage and where at.

Q To whom would that call come?

A There were occasions when it would come to me. Then there were occasions when they would call the representative who serviced the particular area that the unauthorized work stoppage occurred in.

Q What information would be solicited on these calls?

584 A Well, when they reported the work stoppage, of course, our question was what caused it. And if they knew, they would generally tell us.

Q Was this information reported to the International Union?

A It was.

Q How soon after it was received, was it reported?

A I would say as a general rule it was reported to the National Union by telephone in most instances no later than ten o'clock provided that we heard it early that morning.

Q In other words, by ten o'clock in the morning, all strikes in existence in the district at that time which had been reported to you were reported to the International Union?

A Yes, they were.

Q To whose office were they reported?

A Mr. Boyle's office.

Q And he was—

A President of the National Union.

Q Were these reports followed up by any further or future reports?

A Yes, they were. Each representative that serviced a particular area, if a work stoppage was reported to him, or whoever, then that representative was made aware of it, and he would utilize the telephone trying to get in touch with the various officers or mine
585 committees.

* * *

After the strike was finally terminated and the men returned to work, the representative was required to make a written report on what the company said the strike was over, what he had found out from the meetings he had attended and so forth.

Q Did that report often contain or sometimes contain the names of pickets or instigators of the strike?

A It would contain names at times. I wouldn't say that every report did because many times you didn't know whether a particular individual caused the strike or not.

Q But if the district representative involved, or you, found out what the name of a picket or the name of an instigator of a strike was, was that included upon the written report?

* * *

586 A There was times when names, perhaps, were mentioned in these reports to the National Union. I don't know exactly whether you could say that they were identified as pickets or whether they were identified as the persons or person who we felt instigated the strike. But there were names mentioned.

Q What was done with these reports once they were prepared?

A These reports were submitted to me and then—or my secretary—and then they were transmitted to Washington by mail.

Q Was this regularly and customarily done with regard to each strike?

A Yes, it was.

Q To whom in Washington were these reports sent?

A W. A. Boyle.

* * *

598 Q Between the period of January 1, 1969 through November 1, 1973, do you know of any action by the International or District Union to impose discipline upon a local union for engaging in a wildcat strike in District 17?

A From 1969?

Q From 1969 through 1973, the period of this lawsuit?

A Forrest, I am not sure. During that period of time or shortly before that or after this letter or before this letter (indicating), the International Executive Board was fining local unions. I believe there was an automatic fine of three hundred dollars which could be lowered or raised, but I'm not sure whether it was before this or after.

Q What about during the period of time you were president of District 17?

A While I was president of District 17, no.

Q During the entire period of time, do you know of any action by the District or International Union to discipline members of District 17 for instigating or causing or prolonging an unauthorized work stoppage?

599 A Again, I'm not sure when this five dollar thing taken effect and their actions on that, and the three hundred dollar thing. But I would have to say, to my knowledge, I can't recall.

Q A single instance?

A No, sir.

Q Specifically, do you recall or do you know whether any action was taken against Local Union 6572, 7626 and 2236 which represent the employees of Carbon Fuel Company, whether any disciplinary action was taken against them during the period of this suit for engaging in unauthorized work stoppages?

A If you are still referring to 1969 to the time I left the District, again, I have to fall back that I—it sticks in my mind that there was penalties of three hundred dollars lodged against each local union, but I'm not sure

whether it was before this, but it was not during my tenure as president of the District.

Q Do you recall any action against any employees of Carbon Fuel represented by these local unions for instigating and bringing about work stoppages during that period of time?

A During my tenure as president of the District, no.

* * *

606 *Joe Ellis*

CROSS EXAMINATION

Q First of all, did you have any policy at the district level while you were president of District 17 with regard to unauthorized work stoppages?

A Yes, we did.

Q Did District 17 — you are familiar generally with the content of the work stoppages claimed in this lawsuit, are you not, just generally?

A Generally.

Q Did District 17 or any officer or representative of District 17 call any work stoppage that is the subject matter of this lawsuit?

A No, sir.

607 Q Did District 17 or any of its officers authorize any work stoppage that is the subject matter of this lawsuit?

A Not during my tenure as president of the district.

* * *

Q When learning of a work stoppage at all times — within your district — during the period 1969 to 1973, did you and your district reps and all of your people disavow the work stoppage?

A Yes, he did.

Q You say that you had a policy with reference to these work stoppages. What was the immediate goal of District 17 when it learned of a work stoppage?

A It was to find out the cause of it and get the men back to work as quickly as possible, so long as it
608 did not involve a safety issue.

Q All right. If it involved a safety issue, what was — your object then, I suppose, was to see that the safety situation was corrected?

A If there was a safety situation that concerned the whole mine then certainly we would want that corrected before they returned underground. If it was a safety question concerning a particular area of the mine and did not involve a danger to the rest of the mine, we would try to get them back to work and clear up the safety question, whatever it might be.

Q All right, sir. Now, what efforts or what system or what program of activities or efforts did you have during your tenure as president of District 17 to accomplish your immediate goal of getting the men back to work and the mines back in operation? Tell us what you did.

A When we were first notified by the association, or if it was an independent company, in some instances I might be notified. I think in most instances they would notify the representative that service the particular area.

He was serviced with first attempting to contact the officers and mine committee by telephone. If that failed, then he was immediately dispatched himself to the area of where they lived to try to find out what their side of the story was, to make arrangements for getting the people back to work.

609 Q In the event that failed, and in some instances it did, what was the next step?

A Well, generally you would try to make a determination when you went out there — the representative would, depending on what the local union officers told him. If they indicated to him that they felt that the employees would return to work on the following shift or on the next shift which would have been the same shift that they came out on, then they would make a judgment as to whether or not that was possible. If they felt that this would happen, they would not insist on the local union president calling a meeting.

If this was not forthcoming in regard to the returning to work, then they would insist on a meeting being called, a local union meeting, in order to try to get the members of the union back to work.

Q Who attended these local union meetings under this system?

A As a general rule, the representative who serviced the area that the work stoppage occurred in.

Q And were the local officers asked by your representative to attend those meetings?

A Oh, absolutely. Local officers and mine committeemen were asked to attend.

Q Tell us, if you will, who your representatives
610 were during the period of 1969 through 1973, Mr. Ellis.

A Well, I think, Jim, that I could better tell you who the representatives were when I became president.

Q That's what I asked, really. I'm sorry that I broadened it. I forgot you didn't come until March of '70.

A The district representatives were Elza Johnson, Raymond Thompson and Samuel Calloway. We had an International Representative who was Emory McCoy.

Q And were these district representatives the people from your office who went into the field in your three-tiered program to get the people back to work?

A Yes, sir.

Q Now with reference to returning people to work, state to the Court and jury what priority you as district president assigned to that responsibility of your office?

A Well, unauthorized work stoppages took top priority. I even had schedules made up listing the representatives, and if there was a work stoppage in Representative A's area and at a local union and he had, say, grievances set up in that area for the same day, this schedule assigned a representative to take care of his grievances and he was required to attend meetings, if there was one scheduled, or make an effort to get the people back to work.

Q You mean to say that you would shift re-
611 sponsibility to be sure you had a district representative at the site of the stoppage?

A Yes, sir.

* * *

Q Have you ever during the course of your
612 tenure as president of District 17, Mr. Ellis, had occasion to personally go to the site of labor difficulty in an effort to accomplish the goal of getting the mines back to work?

A I have.

Q Did that occur shortly after you assumed the position of presidency in 1970?

A Yes, sir.

Q Do you think that would have occurred approximately a month or two after you assumed that?

A I would say I believe it would be in that general time frame.

Q What company did you visit or what mines did you visit or what company's mines did you visit in that connection?

A I didn't visit any mines. I visited a schoolhouse where they was having a local union meeting which involved the employees of Riverton Coal Company.

Q All right. It is alleged in this proceeding that a stoppage occurred at the Carbon Mines on 4-27, April the 27th, 1970 at both the Carbon and Winifrede Divisions, and the cause which has been assigned here is picketing out of the mine by the Riverton Coal Company employees. Would that be the instance that you are speaking of now in your testimony?

A Well, I recall it was shortly after I became president of the district and that it was Riverton Coal
613 Company. I can't be sure of the date.

Q Well tell us, if you will, Mr. Ellis, what was done in connection with that work stoppage?

Before you answer that, let me ask you a more specific question.

Did you have situations when you were District President of District 17 involving one mine or one local picketing out another mine or another local working for another company entirely?

A Yes, I had that experience.

Q When you had that experience, did you place your emphasis on efforts to return at the source site mine?

A Yes, sir.

* * *

614 Q State, in the setting of one mine's employees picketing out another mine's employees, where your area of emphasis was?

A Well you always go to where you feel your problem arises at and try to resolve that issue. And if you resolve that, then your problem in regard to picketing at other mines would be resolved also.

Q Now describe what you did in connection with the visit to the schoolhouse in April or thereabouts of 1970 when you talked to employees of the Riverton Mines.

A Well, I got a call in my office in the morning and it seems to me like it was before ten, and again, I'm trying to recall from memory. And I believe it was a Tony Deramio advising me that the meeting which had been scheduled at Crown Hill for the Riverton employees and other—officers of other local unions, that Mr. McCoy had arrived there who was a representative at that time—

Q Was that Mr. Emory McCoy you referred to earlier in your testimony?

A Yes. And that he was advised by someone—I don't know who—or some people—that they were not
615 going to have a meeting so long as Mr. McCoy was there.

I asked Mr. Deramio to go back and advise the people gathered there that I would be up there and I would appreciate it if they would wait and listen to what I had to say.

Apparently, Mr. Deramio done that because when I arrived up there, there was a large crowd.

* * *

A Well, I drove up there and parked my car and walked across the railroad tracks and up the walk to where the local union meeting was being held. And I went in and we had a meeting.

Q Did you identify yourself? Did they know who you were?

A I didn't have to identify myself. Most of them knew me.

* * *

616 Q Did you order the men to go back to work at that time?

A Yes, I did.

Q And did they?

A They started back that evening on the afternoon shift and according to my memory, I think most everything was back on the day shift the following day.

* * *

Q Were all of your district representatives instructed as to the policy of District 17 for action to be
617 taken in connection with these work stoppages?

A Yes, they were.

Q And were they directed by you to carry out the policy you had established?

A Yes, they were.

Q Did you ever have an occasion when one of your district representatives failed and refused to carry out your policy in connection with attending a local meeting involving a work stoppage?

A Yes, I did.

Q What did you do as a consequence of his failure to attend that meeting?

A I called him in my office and confronted him with the fact that he had not attended a local union meeting where they had an unauthorized work stoppage in progress.

I gave him a chance to state to me that this would not happen in the future, that he would attend those meetings when directed to do so or that he would attend them even if he wasn't directed, if he was aware of a work stoppage and I was not there.

His response to me was that he would make up his own mind which meetings to attend, so I fired him.

Q Who was that now?

618 A Elza Johnson.

Q Do you know approximately when he was fired?

A Pardon?

Q Do you know the approximate date when he was fired?

A Oh, it was in the early part of 1973. I don't recall the exact date.

Q You spoke of, earlier in your testimony, in answering a question, that if a district representative from your office saw that the men would go back on the next shift, or on the same shift that the men came out on, that he would have to use his judgment as to whether or not that was the best practice to follow. Did you not say that?

A Yes, sir.

Q Now what do you mean by going back on the same shift they came out on?

A Well, that would be like if the day shift came out today, it would be the following day on the day shift that they would return.

Q Was that a practice that grew up in some of the districts or some of the locals in your district?

A Yes, it was.

Q Do I understand that to mean that if the mines closed on the hootowl shift, they wouldn't return until the hootowl shift on the next day?

619 A Yes, sir.

Q I want you to describe to the jury the attitude and the policy of District 17 with regard to that practice and the efforts you took to correct it and the success of your efforts.

A Well, all representatives was directed to exert every effort to get this practice stopped at their local unions. In my meetings with various local officers, I attempted the same thing—to discourage that policy of the shift out, the shift back.

I think we had some degree of success in that area during my tenure as president of the district.

Q It is implicit to your answer, but let me ask you directly. Did the district ever endorse or approve of that practice?

A No, sir.

* * *

620 You did take action to eliminate that practice?

A Yes, sir.

Q Mr. Ellis, how many locals—how many local unions including the ones at Carbon Fuel Company and all of the other local unions in your district did you supervise during the period of your presidency?

A It fluctuated from, I think, about ninety-five to maybe a hundred and one or a hundred and two.

Q And what is the scope geographically, as best you can portray it to us of the jurisdiction of District 17?

A Approximately a hundred and eighty square miles.

Q Did it embrace more than Kanawha County?

A Yes, sir.

Q What other counties did it include if you know and remember?

A Kanawha, Boone, Logan, Mingo, part of Wyoming, part of Raleigh, part of Fayette. I get this county on the Ohio River confused—Mason County, Lincoln County, Logan County.

Q I think you mentioned Logan.

A Did I?

621 Q Yes. Would that be essentially it?

A That would be essentially it, yes.

* * *

635 Q Mr. Ellis, will you now turn to page eleven, please, Section Three. Does this provision appear in that constitution? "If in the judgment of the officers of the international, district, or sub-district union, any local union has taken any action opposed to the interest of the United Mine Workers, the International Union, or the district or sub-district unions having jurisdiction over the local union shall have the right to reverse the action of the local union."

A Yes, sir, it is.

Q During your tenure with the district and during the period of this litigation—1969 through 1973—were you aware of any action by the international or district to reverse the decision of a local union to go on strike?

A That depends on what you call action. Certainly we got out there and the initial action was always reversed by the local union when they returned to work.

Q Did you tell them, relying upon this provision, that their decision to engage in a strike was reversed and that they were to go back to work?

A I didn't tell them that, no, sir. Not in those words.

* * *

637 Q Did you instruct your district officials or did you, when present, invoke this provision of the constitution to reverse the decision of the local union to continue the strike?

MR. McINTYRE: That's been asked and answered.

THE COURT: Overruled. Answer the question.

A Of course, that's rather hard to answer. If you say did we just give up and didn't try to get them back to work, no. If you are asking, did I revoke that by a

letter or an order, no, I did not. But generally speaking, after a local union meeting, the representative, if it was any distance from a local union district office, would call me and advise me of what happened, and when they done this a meeting was already scheduled for the following day, or if in the representative's judgment at that time he felt that something else was going to have to be done in order to get the men back to work, then judgment was made on that.

* * *

Joe Ellis — RECROSS

650 Q Mr. Ellis, you read from the constitution a moment ago at the instance of Mr. Roles regarding reversing action on the part of the local union, is that correct?

A Yes, sir.

Q Did you take action which was contrary to the action taken by the local union in these work stoppage situations during the course of your presidency?

A Yes, sir.

* * *

DEFENDANTS' WITNESSES

682 *Bernard Barker*

Q Mr. Barker, where do you live?

A Sharon. West Virginia.

Q Where are you presently employed?

A Carbon Fuel, Winifrede Division Cleaning Plant.

Q How long have you been employed there?

A Six years.

Q Were you working at Carbon Fuel then in 19... 1970?

A October '70.

Q Until the present time?

A Right.

* * *

707 Q Now, with regard, generally speaking, to work stoppages that affected you at the Carbon Division, cleaning plant, when work stoppages occurred, are you aware of the action taken by Mr. Kincaid — was he at all times president of your local?

A No, Charles Brooks was there part of the time when I first went to work. Charlie Brooks.

Q And also Mr. Kincaid was your president?

A Right.

Q Would you tell us what steps they would take in an effort to get the employees of the mine to return to work?

A Of course, Lester and Charlie were always there when there was a work stoppage and they urged us to go to work.

Q Well I'm not sure that's clear. You say they were always there.

A Well, when a work stoppage and people, you know, when they got word of it — Lester, if he was the president was there and if Charlie, Charlie was there.

* * *

708 Q What would they do — what would they tell you about your responsibility of returning to work?

A They would tell us that we had to return to work. At that time we had to return to work before they could meet with the company.

Q Did the men respond to their directives to return to work?

A Not always.

Q Did they sometimes?

A Yes.

Q If these men — Mr. Brooks and Mr. Kincaid — would ask you to return to work and you wouldn't, what step would he then take?

A The district representative which was Sam Calloway.

Q What would he do?

A He would come up and try to get us to return to work.

709 Q Did he order you to return to work?

A Yes.

Q Did he tell you it was your responsibility to work?

A Yes.

Q And did that on occasion result in your returning to work?

A Yes.

Q Did that always result in your returning to work?

A No.

Q If there was a work stoppage that lasted for three or four days, what else would be done or what all would

be done as a continuing effort to get you to return to work?

A Well, of course, Lester and then Sam and sometimes they brought another representative in which was Ray, I think it's Thompson. Raymond Thompson. He would come in.

Q And what would he tell you?

A The same thing. Return to work.

Q Order you back to work?

A Yes.

Q Was Raymond Thompson a representative of District 17 of United Mine Workers?

A Yes, sir.

Q And when he would come in, would he sometimes be able to get you to go back?

710 A Sometimes.

Q And sometimes not?

A Right.

* * *

Q State whether or not if their first effort was unsuccessful in getting you to return to work they discontinue their efforts or continue their efforts?

A They continued their efforts.

Q How long did those efforts continue?

A Until we went back to work.

* * *

724 *Bernard Barker*

CROSS EXAMINATION

Q Now you have testified that when you have a strike up there, the district representatives come out and order your men to return to work and that sometimes those orders are disobeyed. Is that true?

A Yes.

Q What happens to the men who disobey the district's orders?

A Nothing that I know of.

Q You mean the district doesn't — what does the district do? Do they come out and order them again?

A Yes, they keep coming back until we go to work.

Q They keep coming back and ordering you go back to work until you get back to work?

A Yes.

Q And some cases do they request that you go back to work rather than ordering?

A They usually tell us our responsibilities and tell us we have to return to work.

Q But if you don't return to work, what happens?

A They come back.

Q And tell you again?

A Yes.

Q Until you do go back?

725 A Yes.

Q Do they ever tell you that anything would happen to you if you didn't go back to work?

A Well, they have never told me. Whether they have told any other people, I don't know.

* * *

Bernard Barker

REDIRECT EXAMINATION

Q Had disciplinary action been taken against members of your local, would it have improved or aggravated the situation regarding the duration of the strike?

A It would have aggravated it.

* * *

768 *William Clifford Cline*

Mr. Cline, where are you employed?

A I am employed for Carbon Fuel Company at the Carbon Division.

Q And are you a member of the UMW?

A Yes, I am.

Q Now, how long have you been employed at Carbon Fuel?

A Since September 29, 1965.

Q And are you an officer of your local union?

A Yes, I am.

Q What local union is that?

A 6572. I am president.

* * *

776 Q And would you tell the jury, please, for the period 1969 through 1973—what the response of your local union officers would be to an unauthorized work stoppage?

A Well, I have had the pleasure of knowing several of the—the two presidents before me and being as I had been a local officer at the previous company I worked for, I paid close attention to their actions to see how business was transacted at their local. And they would immediately, if a work stoppage occurred, speak to Mr. Daniels. He would get right to the party who was actually involved in it and he would get the evidence and they would most of the time take them personally and go to the company and try to settle something, to settle it if they possibly could.

And if there was no settlement reached there and the mines was on strike, the president would put up a sign at Decota calling for a special meeting for all members to attend.

* * *

Q And were any of the local union meetings there were called actually held? Did you hold local
777 union meetings?

A Oh, yes.

Q And what would happen at those local union meetings?

A They would discuss the problem and most of the time they would already have a field representative there. At that time, it was either Mr. Raymond Thompson or I think Mr. McCoy came up there a few times. I'm not positive on Mr. McCoy but I am positive on Mr. Thompson.

And they would talk the problem over and tell them the circumstances of what would happen if they didn't get it back into operation and they would also tell them—advise them if they did not know all the steps, what could be done and what support they would give them and all to get the men back to work.

Q Were there any directives to return to work?

A I didn't quite hear you.

Q Did the local or district officials say anything about going back to work or not going back to work?

A Mr. Raymond Thompson's advice was always to go back to work and "I will immediately take care of this situation."

* * *

779 Q You mentioned that Mr. Thompson from District 17 had been at your local union meetings which were called after a stoppage occurred. Have any other district representatives or officials of the
780 district been at your local union meetings?

A Yes, sir. I have had the pleasure of even having the President of United Mine Workers there besides, as you know some of the attorneys, the executive board members, field representatives—I believe I have had them just about all there.

Q What actions or statements do those persons take or make?

A They try their best to answer the questions as put to them and then tell them the consequences what will happen if they don't go to work and advise them as attorneys of their legal rights on this here and their interpretation of this particular part of the contract which is in dispute.

* * *

785 *William Clifford Cline*

CROSS EXAMINATION

Q And you testified in these local union meetings that you asked the men to return to work and presented arguments to them as to why they should return to work?

A Are you referring to since I have been president what I done or what the other presidents done?

Q I'm talking about the whole period of time.

A Yes, that's on a general way.

Q Would you order them or did the other local union presidents order the men to return to work?

A Yes.

Q Oftentimes the men did not follow those orders, is that not true?

A That's true.

* * *

Q Were you aware of any action taken against the men for disobeying an order to return to work?

786 A No.

Q All right. Now you have said that local union officials have described to the men the consequences of their failure to return to work. Is that true?

A Yes, sir.

Q What consequences did they tell them they would encounter?

A They could be fined and even go as far—the local union could be fined, the individual could be fined and

they could even go as far as pulling the charter from the local union.

Q Okay. Did the men always in response to these statements of consequences return to work?

A Not always.

Q And when they didn't return to work, was the local union fined, the men fined or the charter revoked?

A I don't know of any such case.

* * *

797 *Harold Edmond Burke*

Q Directing your attention to the period 1969 through 1973, Mr. Burke, were you an employee of the Carbon Fuel Company?

A Yes, I was.

Q When did you begin your work there?

A I started in November of 1968.

Q And when did your work there conclude?

798 A During that period of time, the first departure was in July of 1972.

Q Did you return to work there after at Carbon Fuel?

A I returned in September of '73 until February of 1974.

Q All right. And during the period of time you were off, '72 through '73, did you work during a part of that period at the office of District 17 here in the city of Charleston at the United Mine Workers?

A Yes.

* * *

800 Q What happened when the order from the local did not result in your return to work?

A Of course, as I said, always we were directed to return and if no action was taken, if no back to work movement would occur, our local president would again reschedule meetings immediately. If we were to return on the four o'clock shift and no action, usually
801 there was a meeting that evening and if not usually six o'clock the next morning.

A At that meeting, was anybody present other than the local officers?

A A large majority of the time the district officials were always in attendance when there was a work stoppage, a district representative.

Q During this period of time, Mr. Burke, who was the district representative who was in attendance at those meetings?

A During this period, Raymond Thompson was our field representative.

Q Do you remember the name of any other district officer who attended those meetings during that period of time?

A Emory McCoy—Mr. Thompson started serving our local, I think it was around late '68 or early '69. I had not been involved in late '68 so I would not know of any other representative.

Q Only Mr. McCoy and Mr. Thompson?

A Right.

Q What, if anything, would the district representative tell the men at that meeting?

A Again, he would always direct us back to work after discussing the problem to an extent. We would always be directed to go back to work.

Q Did that district directive result in the men returning to work?

802 A Again, sometimes it would and sometimes it wouldn't.

Q And if it did not, what would happen next?

A Well, at times it would just be a continuing process where the problem—if meetings would be scheduled during this work stoppage, but again, meetings would be rescheduled. It was just a circle basically.

Q And how long would these rescheduled meetings continue to occur?

A Immediately, you know—again, if the order was given on eight o'clock shift and no action, the meeting could be scheduled at two p.m. or one p.m.

Q When would the meetings cease to occur?

A When the first back to work movement would happen.

* * *

803 Would you state for the benefit of the Court and jury what the district policy was in that regard.

A Again, it would be upon any information of any walkouts, work stoppages, the district would immediately dispatch one of the field personnel. In some cases, schedules were rearranged to get the representatives to the work site, to the meetings, to get the men back to work.

Q What was the policy of the district office with reference to requiring attendance at those meetings by district representatives?

A I would say it is probably a hundred percent participation where a district rep. is always at a back to work meeting, to my knowledge.

Q Did that policy of the district continue throughout the time you worked out of the district office?

A Yes, it did.

* * *

813 *Harold Edmond Burke*

CROSS EXAMINATION

Q You have described what happened at these meetings and I don't want to belabor the subject, but as I understand it, you say that district representatives were almost always or most commonly present at these local union meetings during a strike?

A Yes, that's correct.

Q And that they urged the men to return to work at the end of the strike?

A Directed, yes.

Q Did they ever state what consequences or further action might be taken by the International or the District unions in the event they did not do as they were told?

A We were always advised of the proceedings that could happen, yes.

Q What were those proceedings?

A Federal court, the unions constitution. A number of things were discussed.

Q Was anything said in these meetings about any disciplinary action, such as fines of the local or individual members of the local if they refused to comply with the constitution and the orders of the district or international union and return to work?

A I don't think it was discussed that openly. I think everyone was aware of the consequences that
814 sometimes was not corrected.

Q But you don't recall that specifically being said by a district representative in any of the meetings that you attended?

A Oh, yes. Yes, it has been said.

Q Was this said at each meeting in a succession of meetings during a strike?

A It depended on—we were always directed to return to work and we were always advised in a general area of the consequences.

Q But none of those consequences ever came to pass, did they?

A As far as discipline?

Q Yes.

A No, not to my knowledge. It could inflame the situation.

Q There weren't any fines against the locals and there weren't any fines against the individuals or any other action to enforce the constitution, were there?

A Not during my work.

* * *

817 *Jack Perry*

Q State your full name, please.

A Jack Perry.

* * *

Q And by whom are you presently employed?

A District 17.

Q And in what capacity are you presently employed?

A I am the District President.

Q And how did you become District President?

A Through the elective process.

Q And when were you so elected?

A On May 20 I was appointed on May 21, '73. Certification came through some time later.

Q Then prior to becoming District President, were you a coal miner?

A Yes, I worked underground more than twenty years.

* * *

818 Q Now after you became District President, were you aware that there were work stoppages at the Carbon Fuel Mine occasionally? I'm speaking of the period now between your election and October of 1973?

A Well, I may be vaguely aware of some stoppages during this period you speak of, but I know of nothing of any real magnitude. Nothing that would stand out.

Q And just generally, how did you become aware of these work stoppages?

A Generally, we asked our membership to advise us, you know, our local union officers to advise us when there is a work stoppage and we also called the association people. They are the first people usually to know. Because they are informed from the mine if there is a work stoppage. And we called the association to find out if everything is working.

819 Q And when you learned of a work stoppage, what did you do?

A Well, when we learned of a work stoppage, the representative who services this particular local union gets in touch with the local union officers. He directs these people back to work. If no action is taken then, he directs them to have a meeting and he will be in attendance at this meeting.

Q And at that time, if the men don't return to work, are there subsequent meetings held?

A Yes, there is.

Q And is he in attendance at these meetings?

A Yes, sir, he is also in attendance at these.

Q Now was it a policy that the district representatives were required to be there?

A Yes, they were.

Q To the best of your knowledge have any of the district representatives not attended or followed out that policy?

A There may have been times since my tenure in office —

Q During the period '73 to the end of '73?

A I have no knowledge of that, no

Q Who at that time, from early '73 until October of '73, who was the field rep. who would have serviced the Carbon Mines?

A I believe that was Mr. Raymond Thompson's responsibility.

Q And to the best of your knowledge, did Mr.
820 Thompson always follow the policy set out by the district?

A Yes, he was a very dedicated representative.

Q Now, could you tell the jury what priority the district, during your tenure, gave to work stoppages?

A Work stoppages received the highest priority.

Q By that what do you mean?

A I mean Number one priority, to terminate a work stoppage is our most important function, is to see that collective bargaining agreement is abided by.

Q And what would happen if that field representative that serviced a mine had previously engaged—previous engagements or other duties at that time?

A Someone else would be assigned to the duties he had and he would be dispatched to the meeting.

Q Mr. Perry, during the period after you were elected until the end of August or October of 1973, did the district ever call any work stoppages?

A I don't recall. No, the district has never called a work stoppage.

Q Thank you. Have you ever authorized one?

A No, sir. I don't have any power to do so.

Q Who has the power to call work stoppages?

A Only the International Union.

Q And during this period, did the International, to the best of your knowledge, ever call or authorize
821 a work stoppage in District 17?

A No.

* * *

823 *Jack Perry*

CROSS EXAMINATION

Q It is in evidence, Mr. Perry, from your testimony and the testimony of others, when strikes occurred, district representatives were sent out to tell the men to stop the strike and go back to work?

A Right.

Q And they regularly did this at local union meetings?

A Yes.

Q And they did it during the period that you were president from May 21, 1973 down to the cut-off date, in this case in October 1973?

A Well, I certainly assume it was done in every case since it was the policy of the district.

Q And as a matter of fact, that had been the practice in the district for a long time going back years, hadn't it?

A That was the practice prior to my coming into the office, yes, sir.

Q Did you know from your own association with the industry and your own experience that they had been

doing the same thing for years in connection with work stoppages?

A I know this was practiced where I worked at Logan County also, yes, sir.

824 Q And very often sending a district representative out to a local union meeting to tell them to go back to work proved futile, didn't it?

A Yes it did.

Q They didn't go back to work in many instances, did they?

A That's true.

Q And it might be days later before they did, isn't that true?

A That sometimes was true, yes.

Q And when they finally did go back to work the same thing might happen and frequently did happen in a few weeks or months later or even days later, isn't that true?

A I suppose that's true, also.

Q And the process was repeated and repeated?

A Yes.

Q And it didn't solve the problem of these unauthorized strikes, did it?

A No, it apparently hasn't done that, no.

Q Do you know of any instance when the International or District 17 for that matter has taken any other disciplinary action or enforcement action of any kind with respect to these repeated work stoppages, other

than to send district representatives out to tell them to go back to work and urge them to go back to
825 work?

A No, sir. I would like to expand on that a bit, if I could.

MR. JOHNSON: You have answered my question.

THE COURT: If you want to explain the answer, go ahead.

THE WITNESS: It is my opinion that my first obligation should be to confine a work stoppage to the area that it is and to try to settle it there. To impose discipline on individuals when you have a spontaneous action, no glaring distinction would inflame the situation and possibly cause it to expand which we don't want it and I'm sure management doesn't want.

BY MR. JOHNSON:

Q Unfortunately, though, they very often do expand, don't they?

A They do.

* * *

865 *Lester Kincaid*

Q Mr. Kincaid, are you now—let me put it this way—have you ever been the president of Local No. 2236?

A Yes, sir.

Q When did your office and term as president of
2236 begin?

A I believe, Mr. McIntyre, that I began my term in

1969. And before that, I was vice-president under
866 Mr. Brooks and he had inner ear problem and he didn't work for quite some time and I had to take care of it as the vice-president.

* * *

876 Q Mr. Kincaid, as president of Local 2236, I want you to describe to the jury what you did and what steps you took and what action was taken by you in connection with work stoppages which occurred at the Winifrede Division of Carbon mines from the period 1969 through 1973?

A Anytime, Mr. McIntyre, that I had a work stoppage I got hold of the district and I told them. They would want to know and I wouldn't call the district until I found out what the problem was about and then I would call the district and sometimes I'd have to get some of it from the company and some from my men. I would have to call them at home. And I would get ahold of them then and find out what the cause of the work stoppage or why they were out and I would call the district and I would have a meeting the next day.

877 Q Excuse me. Ordinarily during that time, were you working yourself on the day shift or not?

A A lot of times I was working and I knew nothing about it until some of the motor runners would tell me.

Q Tell the jury which shift during that time you were working, principally?

A I was working at Winifrede at Carbon Fuel Company uses the alphabet A B and C. A shift is the night shift or the hootowl, and C shift is the evening shift.

Q And which shift did you usually work during the period 1969 through '73?

A I worked the B shift.

Q That's the day shift?

A That is the day shift, yes, sir.

Q Did you receive calls at all hours of the day and night?

A Sir, I would receive calls and the motor runners would tell me which outfit had went out, that 34 had went back and then I would have to start and try to find out why they went back. Seems like nobody didn't know, the company or nobody else. And I would try to find out who and why they went back.

Q Suppose you got a telephone call after mindight that a work stoppage has occurred. What would you do?

A I would go to work the next morning.

878 Q And if the work stoppage continued, what did you do then?

A I would get them all in the bath house and we would have a meeting there and discuss the situation.

Q What, if anything, did you tell them?

A I would tell them the seriousness of the work stoppage and how soon that Mike Cohen would be with me with a TRO and if we didn't go back to work, our local union would be in contempt of court and subject to a fine.

I explained that to them dozens of times, Mr. McIntyre.

Q State whether or not you gave them any orders or direction regarding returning to work?

A I always give them orders to return to work. I have never shirked my responsibility.

Q How soon would your first contact with involved miners be after you first learned of a work stoppage, ordinarily?

A I would generally have my meeting the next day at twelve o'clock and then I changed it to eleven in case they would go to work so they would have time to go home and get ready to go to work.

Q And was it at this meeting that you told the men to return to work?

A Yes, sir.

879 Q Did you do that in connection with every work stoppage that occurred at the Winifrede mines during 1969 through 1973?

A Yes, sir.

Q What was the result of your ordering them back to work? Did they go back?

A Sometimes and sometimes they didn't.

Q Now on the occasions when you—well, you say sometimes they did?

A Sometimes, yeah.

Q Did you have work stoppages which lasted only a shift as a result of their agreeing to go back?

A Yes, I have had one shift.

Q Have you had stoppages lasting as little as a day because of your ordering them back to work?

A They've lasted one day and then maybe longer.

Q Well, state whether or not you have been able to get them back on occasion within a half a day or a day?

A I have got them back to work in a day but I don't recall which strike it was, but I have got them back in one day's time.

Q All right. Now, assuming you had this meeting, ordered them to return to work and they didn't go, what did you do then?

880 A Whenever I ordered them to return to work, I would go up on the A shift on the hootowl and see if they was going to return. Then I would talk to them there again. Then I would give them a chance to go back then. On other days, I would get up the next morning and go to work I would go up and if the day shift didn't go and someone then would say, the hootowl didn't work, so we'd go in the bath house and have another meeting and if the day shift didn't go, if the B shift didn't go, Mr. McIntyre, then I was there that evening with the C shift trying to get anybody that I could get underground. I didn't care who went.

Q Did you ever—what would happen if you would notify the district about the existence of this stoppage? What, if anything, would the district do?

A At that time when I would notify the district, Mr. Sam Calloway would always come to my meeting.

Q And within what period of time after the onset of the work stoppage, would he be there, ordinarily?

A When I'd call him, he'd be there at the meeting that day at noon.

Q All right. And at those meetings, what, if anything, did Mr. Calloway do or say to the men regarding the work stoppage?

A Mr. Calloway always got the floor, I always gave him the floor and we only discussed the work
881 stoppage. Not ten thousand other things. We discussed the work stoppage in my local union. And Mr. Calloway would get up and tell them they would have to go back to work before the grievance would be handled, and we would get the grievance handled "if we can get you back underground" and he would tell them the seriousness of the work stoppage.

* * *

898 *Lester Kincaid*

CROSS EXAMINATION

Q Now, Mr. Kincaid, you testified that as president of the local union, you immediately upon the learning of a work stoppage, called the district, is that true?

A Yes, sir.

Q And that was your uniform practice throughout this entire time?

A Yes, sir, I used that all the time.

Q And you usually found out about it within a shift anyway of when it occurred?

A Probably, yes.

Q So within a shift the district, through this entire time, was aware of the existence of a work stoppage at your mine?

A They probably knew it before me.

Q Because Kanawha Coal Operators told them even before that?

899 A Yes, sir.

Q So Kanawha Coal Operators got the word to them even before you did, usually?

A Oh, yes, yes, sir.

Q They would have the word to them within an hour or so, wouldn't they?

A They'd probably have it to them within fifteen minutes if the district was open at that time.

Q Now you said that as soon as you had a work stoppage, you called a local union meeting and at that local union meeting you called it at the bathhouse and at that local union meeting you told them about the seriousness of the work stoppage and you told them that the company would get a temporary restraining order from federal court to get them back to work and told them if they violated the temporary restraining order, they might be held in contempt of court and fined. Is that what you told them?

A Yes, sir, I told them that several different times.

Q Did you tell them anything about the seriousness of it, other than the possibility that they might get fined in federal court?

A Oh, yes. I told them about that because every time—

Q I mean anything other than federal court?

A I would tell them that they could be fined
900 through the international union.

Q And did you make specific reference to the constitutional provisions relating to international discipline and district discipline for engaging in an unauthorized work stoppage?

A The biggest part of them knew that already, Mr. Roles.

Q So you didn't need to tell them?

A I figured the biggest part of them knew about it already.

Q Did you tell them about that every meeting you had or practically every meeting?

A It was just like a scratched record, Mr. Roles. I told them each time over and over.

Q You kept telling them again and again?

A Yes, sir.

Q And you kept ordering them back again and again?

A Yes, sir.

Q Now you ordered them back everytime and you warned them about international discipline everytime. How many times has the international disciplined them?

A None as I know of.

Q How many times has the district disciplined them?

A None as I know of.

Q Your orders weren't worth a dime, were they?

A I believe we said that in June 1974. Yes,
901 sir.

Q And that's true, isn't it?

A Yes, sir.

Q And the district's orders weren't worth a dime either were they?

A At that time, I would say no. If they didn't return

to work, nothing wasn't worth a dime. It wasn't even worth a penny.

* * *

914 *Samuel C. Calloway*

Q What is that position, sir?

A International Representative.

Q And you are working out of what office?

A The Department of Contract Administration, Washington, D. C.

Q Directing your attention to 1969, Mr. Calloway, were you a member of a local union in the Carbon
915 Fuel Company Coal plant here in Kanawha County?

A Yes, I was.

Q What local union were you a member of?

A 6572.

Q Were you an officer in that union at any time during the year of 1969?

A The first part of 1969 I was the vice president of the local union. On or about July 20, I assumed the position of president.

Q That local is in what has been referred to in the evidence as the Carbon Division of Carbon Fuel Coal Company's operation, is that correct?

A That is correct.

Q I believe you indicated you were president for a brief period of time in 1969?

A Yes, I would say two months.

Q Following that, what position did you hold or occupy, if any, with the United Mine Workers of America?

A I was appointed to a job at the District 17 office here in Charleston.

Q And what position were you appointed to?

A Well, to start with, in September '69, I audited some books. Then two months later I assumed the role of Field Representative, as we call it.

916 Q How long did you continue as Field Representative for District 17?

A Through June 30, '74.

Q So for the period of late '69 through 1974, you were a district representative for District 17?

A That is true.

Q What was your assignment as a district representative?

A My assignment was first to keep the men working, and secondly, to get them back to work whenever there was an unauthorized work stoppage.

Q Did your duties include other responsibilities?

A Yes, I would handle grievances on the third step or the intermediate board hearing.

Then, following that, I had briefs to write and I also answered over the telephone contractual questions when the men would call in.

Q Did you perform this range of services during the entire period of your service as a representative for District 17?

A Yes, I did.

Q Having served there during that period, can you state the policy of the district with respect to work stoppages?

A Work stoppages were given priority. Now what I mean by that, just to go a little further, if I had
917 a grievance to handle, usually mine were in the afternoon about three o'clock. If I had a call there was a stoppage, I would take care of the stoppage first. And I had the meetings late because I had to take care of such things.

Q With regard to the district's policy on stoppages, in general terms were work stoppages of that sort favored or disfavored?

A They were disfavored.

Q At the time of your acting as District 17 representative and throughout that period of time, was there a policy or a plan at District 17 in the event of a work stoppage, to take action regarding it?

A Yes.

Q Would you outline what that plan was for the benefit of the Court and the jury?

A Further with the work stoppage I would call the officer of the local union, and ask him the reason or cause. And sometimes his response would be that "I can take care of it myself. I can get the men back." Then possibly, if he couldn't take care of it, he would call me at home that same afternoon, or else if I didn't hear from him, I would call him the next morning, asking him to arrange a meeting, if he could not get them back to work.

918 Once the meeting was arranged, I would attend the local union meeting, and I told the men to

return to work, that they should be working. It was a violation of the contract that they signed to work for Carbon Fuel Company, and there was no reason for them to be out, if they had a grievance they should file it under the contract.

And I further told them that the prolonging of a stoppage could cause lifting or revoking their charter and also that the companies would go to court and get TRO's and they would be forced back to work. And so rather than do that, since they would have to go anyway, they should go on what I told them.

Q From your personal experience, were a number of the work stoppages brought to a conclusion prior to your having a meeting with the local officers and the local members?

A Yes, because there were numerous one-day strikes and if you notice that report that I think Mr. Toney testified from, numerous stoppages started Friday and returned Monday. So according to that report, that looks like that's a three or four day stoppage. But Saturday and Sunday the mines are not scheduled to work.

Q State whether or not many of the work stoppages were brought to a conclusion after your meeting with them at the union hall with the local officers?

919 A Yes. They were brought to a conclusion and the men returned to work after meeting with them.

Q In the event the stoppage was not brought to a conclusion by your first conference, your telephone communication with the local officials, or by your meeting with the miners themselves as a district representative, what steps were then taken?

A I would request another meeting. I was insistent upon the local union president arranging another meeting. And then it has come to me now, while discussing this, if they would not return in another meeting, then President Joe Ellis at this particular time, we would arrange a meeting in the district office. Sometimes that meeting would be during working hours and other times we stayed after working hours to hold meetings.

* * *

925 *Samuel C. Calloway*

CROSS EXAMINATION

Q In local union meetings, Mr. Calloway, that you attended, were votes taken as to whether or not to return to work?

A Now, what do you define as a vote?

Q Well, any indication by sign or otherwise of a division among the house or a division among the members present as to their desire either to go to work or not to go to work?

926 A I would say that in some meetings a show of hands only.

Q And in those meetings in which there was a show of hands, it was clear to you which of the individuals in the local union were indicating a desire that the local union continue to strike?

A No. I still didn't identify the men.

Q You didn't know the name of a single one of them?

A Well, over a five year period, I would say that I just didn't identify them period. Because it's company

responsibility to identify the men who cause work stoppages.

Q And so you didn't know the name of a single person who voted to continue the strike?

A No.

* * *

939 Q Did you ever threaten the local union with disciplinary action under the constitution if it engaged in a work stoppage?

A Well, again, my job was to keep them working if they were working and to get them back if they were out. And it was management—management discharges people under the discharge procedure to discipline them.

THE COURT: Mr. Calloway, now, the question is whether you did it or not. Not whose duty it is, but just did you or did you not threaten to discipline the local, I believe, was the question.

MR. ROLES: That's correct.

A No, we did not make a threat of disciplinary.

Q Now did you threaten to discipline individuals if they picketed or otherwise brought about work stoppages?

A You are talking about—well, no.

Q Once the work stoppage began, did you threaten local unions with disciplinary action if they didn't go back to work?

A No, because they were already being disciplined through the discharge procedure.

Q And did you threaten individuals with discipline if they continued picketing or otherwise bringing about the work stoppage?

940 A There was no threat because that was management's prerogative, to discipline.

* * *

Q You have testified on direct examination that you told officers of the local unions that their charters might be revoked?

A Yes.

Q Did you do that?

A No. That's in the hands of the international union.

Q Did you say that to the local unions?

A Yes.

Q Did you say it to Local Union 2236?

A I'd say over a period of five years, yes.

Q How many times?

A I don't know exactly.

Q Well, tell me approximately.

A I would say two or three times, at least.

Q Was their charter ever revoked?

A Not to my knowledge, no.

Q Did you ever recommend such to the international union?

* * *

941 A No. It wasn't my job to do that. That was an officer's job. I was just a representative.

* * *

943 *Raymond Thompson*

Q Directing your attention to the period 1969 through 1973, Mr. Thompson, did you have a position with the United Mine Workers of America?

A Yes, sir.

Q During the period of '69 what was your position?

A I was a field representative.

944 Q Assigned to what area?

A To—in the Kanawha and Boone fields.

Q Did you in 1969 have as one of your assignments as district representative locals of the Carbon Fuel Company?

A I had two—6572 and 7626 Carbon.

* * *

946 Q Tell the jury the policy and the practice of district representatives, such as yourself, in dealing with work stoppages that occurred in mines or locals that you serviced.

A Well, it has always been the policy of the district—I could go back to the year 1940 where I went to work in the mines, that first priority was work stoppages in this organization. The field representative had the responsibility, first was a work stoppage. He also handled all grievances in his area. If he had a work stoppage in his area and under the jurisdiction of one of his local unions, then the first thing he would do would be get hold of the president of the local union and officers, if necessary, arrange a meeting immediately—

Q By what means was this communication accomplished?

A This was usually by telephone, if we could reach him. And set the time and the place of the meeting, and have any interested parties and have all members there, if they could get it.

947 Q Did you attend those meetings?

A Absolutely. I attended every one.

Q In connection with all work stoppages involving the mines of Carbon Fuel Company, Carbon Division, during the period you served as district representative, did you do that?

A Yes, sir.

Q Were there work stoppages that were brought to an end prior to the time of such a meeting?

A There sure were.

Q How was that accomplished, if it was accomplished?

A Well, you would contact the officers of the local union, most generally the president, he was your main contact, and if it was a minor thing such as equalizing of work or something that he thought he could handle, we would advise him to get hold of the company and see if they couldn't iron it out and settle it and get the men back immediately without further consultation around the mines, which they did. In fact I know of several times that the officers of Decota's locals, the Carbon Division, has contacted me and I have advised them to try to get hold of Mr. Kessler, who is division superintendent of the Carbon Division, and see if they couldn't get it settled, and they would.

They have went back on the next shift, by them going to the office and hunting up Mr. Kessler and working it out, which we would never need the meeting to be arranged.

948 Q Did that happen in connection with work stoppages which are contained in the lawsuit presently here on trial?

A I think they are. I think there is some mentioned in it.

Q In the event they could not get it stopped in that fashion, what was done, if anything?

A On the next day if they couldn't get it done, they was to arrange a meeting immediately and call me so I could attend.

Q Did you or did you not attend those meetings?

A I did. And sometimes it would be difficult because I would have meetings scheduled at other local unions where I had grievances to handle and I would have to go in and make arrangements for other representatives to go into my field and handle grievances so I could attend these meetings.

Q Now, tell the jury what happened when you went out to this meeting during the course of a stoppage.

A Well, you would go into the meeting, which it is something that only people that attended these meetings would know what you were into because these meetings sometimes can get hostile. So you would have to go in them and you would have to eliminate all other discussions other than what this work stoppage was confined to. You would have to confine it to this discussion. And you would discuss it with the people and you
949 would order the men back to work and if they had a grievance to file a grievance because they were entitled to a hearing. Everyone is entitled to be heard.

Q And did you do that?

A Yes, I did.

Q In each instance?

A In each instance. Unless it was settled and they went back to work without a meeting.

Q All right. Now, did this meeting that you are speaking of, this first meeting which you attended, with officers of the local and members of the local, in which you ordered them back to work, result in the bringing to an end of work stoppages?

A Sometimes it would and other times it wouldn't. So what you would have to do, if it didn't, you would foresee or have the president call a meeting for you the next day hoping to resolve it then or as quick as possible.

Q Did that happen on occasion?

A Yes, it did.

Q Were you in attendance at that meeting?

A Yes, sir.

Q In every instance?

A In every instance.

Q What was your purpose in having these meetings?

A To eliminate the work stoppage and get the mines back into operation.

950 Q When you attended subsequent meeting or meetings, what would you say to the miners with respect to returning to work, if anything?

A I would order them to get the mines back into operation and filed—if they had a grievance and what they had, to file a grievance under the terms of the contract, the National Bituminous Coal Wage Agreement.

Q Were there other things that you did, Mr. Thompson, other than the scheduling of these meetings and so forth?

A Yes.

Q To attempt to bring to an end work stoppages?

A Oh, yes.

Q Explain to the jury what those other actions were.

A I have went out in my car and picked up the officers and go to people's house because you always find around an operation there is some people that are more outspoken than others. And these people you would try to get to and talk to get their influence, to help get their influence to get the mines back into operation and you would have to go around and talk sometimes to maybe twenty-five or thirty or forty individuals with the local union officers.

Q Have you carried out that practice in connection with work stoppages which are the subject matter of this lawsuit?

951 A Yes, sir.

Q Was this activity confined to the daytime hours?

A No, sir, I was on call twenty-four hours a day, seven days a week.

Q Were there occasions when these activities occurred in other than the daytime hours?

A Oh, yes, yes.

Q When would they occur?

A I've had them occur more, I think, on the hootowl or the midnight shift and I have been out and talked to

the individual at twelve, one, two, three o'clock in the morning.

Q How long did your efforts, as you have outlined them here today, continue?

A Until the mines returned to work.

Q In every instance?

A In every instance. And farther, I have, on work stoppages where maybe I have went in and talked to Mr. Ellis and Mr. Humphreys, on several occasions, and also to Jack Perry—Mr. Perry is now president of the district—and ask them if they knew of anyone in the local unions that they had any influence in to get hold of them, which Mr. Ellis has told me that he has, but I've never heard him make the call because he would go back to his office.

Q Were meetings ever held with local union
952 officials at the district office in the City of Charleston?

A Many and many a times.

Q In connection with work stoppages?

A Yes, they have.

Q Any of the work stoppages covered by this suit?

A I know of one.

Q Which one was that?

A That was the discharge of the Hodge boy. I don't know his first name because it's been so long.

Q All right.

A I do recognize his—

Q A meeting was held in the district office?

A Yes, sir, it was.

Q Were you a participant in that meeting?

A Yes, I was.

Q What was the purpose of that meeting?

A Well, we wasn't successful by attending the meetings to get the men to return to work and the meeting was to call the local union officers in and the individual who was involved, and to talk to them and tell them the seriousness of these problems, and in fact I think this was in the face of a TRO, after the TRO was issued that this local union—

* * *

965 *Raymond Thompson*

CROSS EXAMINATION

Q I say, so far as you recall, no disciplinary or other action was ever taken against any local union member who openly advocated continuing a strike that you had ordered the local to end?

A No, sir.

Q Isn't that true?

A The only people that's ever been punished by it is where the company has put their fingers on the discharge and relieved them of duty.

Q You have testified that after you attended these meetings and ordered the men to go back to work, that sometimes they went and many times they didn't. And if they didn't return to work, that you continued to urge the local to set additional meetings and you continued to go to those additional meetings and make the same speech, isn't that right?

A Mr. Johnson, I didn't urge. I ordered them.

Q All right. You ordered them to go back and they didn't go so then another meeting was set?

A True.

966 Q And then you went to that meeting and you ordered them back again?

A True.

Q And sometimes they would go and sometimes they wouldn't, isn't that true?

A This is true.

Q Isn't it a fact that sometimes strikes would continue through several meetings before they returned to work?

A Yes, I have attended as high as three or four in any one stoppage.

Q And day after day after day you would go out there and give them the same orders and in effect tell them the same thing?

A True.

Q And nothing was ever done to enforce or penalize anybody for disobeying those orders?

A No, sir.

* * *

967 Q You testified that when you went to these meetings and especially if they did not respond to your orders promptly, that you would tell the members at the local meeting what the international could do to them, as I recall the words?

A True.

Q What did you tell them that the international union could do?

A I told them they could pull their charter and they could try the individuals.

Q To your knowledge during the period 1969 through 1973, was any local union ever pulled for engaging in unauthorized strikes?

968 A No, sir.

Q And so far as fines are concerned, do you know of any local union or individual during that period from 1969 through 1973 who was subjected to a fine for promoting, instigating or encouraging an unauthorized strike?

A No, sir.

* * *

970 Q You said you did tell the employees in these unauthorized work stoppages what the International Union could do if they did not return to work. Did you ever tell them anything that the District could do if they did not return to work?

A Well, that would be something that someone else would have to answer. I told them what the International could do about bringing charges against the individuals and pulling their charter and the response I got, "Well, there's the charter, take it with you."

971 Q Now you didn't tell them anything different that the District could do from what the International could do, is that right?

A No, sir.

Raymond Thompson

REDIRECT EXAMINATION

Q Mr. Thompson, do you know why no action was taken to discipline locals or pull their charter?

A Well, it would only aggravate things and you would have probably a nationwide shutdown, if you started that, in the coal industry.

* * *

Q You speak of, in cross-examination by Mr. Johnson, a feeling or a sense of hostility when you on occasions attended these meetings at the locals, is that right, Mr. Thompson?

A This is true.

Q Was that a localized thing? One person being hostile, or on the other hand, was it a generalized
972 thing?

A It was a general thing to the group as a whole. Usually when they was hostile this way, your President of your local and your officers and field representatives was the one that they was really hostile against.

Q That would be everybody?

A Yes.

* * *

1035 *Arnold Ray Miller*

A I am President of the United Mine Workers International Labor Union.

* * *

1037 Q Mr. Miller, I want to inquire of you as to the policy of the United Mine Workers of America with respect to work stoppages in the coal industry and

in the coal fields. Does the International have a policy with respect to that?

A The policy was and is yet today in the event of a work stoppage that the membership be directed to go back to work at the site where the problem occurs and a meeting is to be called and the district representatives to go to the meetings and hopefully find out what the problem is and try to arrange a meeting with management when management will agree to meet.

Q And what is the overall purpose and object of those meetings?

A Well, first you have to find out what the problem is so you can resolve the problem between the two parties.

Q And is there an object or purpose in this solution of that. What is your purpose in doing these things, if any?

A Well, everyone suffers in the event of a work stoppage, not only the industry but our membership and the general public and it is our desire to bring these
1038 problems under control and prevent them if it's possible.

* * *

Q During the period of your presidency, Mr. Miller, which is also covered in part by the period encompassed in this lawsuit — in other words, this lawsuit continues through I think the date of October of 1973 and you say you assumed the presidency in December of 1972?

A Yes, sir.

Q Now, during the period covered by this law-
1039 suit, what was — what did the International do or order by way of policy and directive to bring work stoppages to a conclusion?

A Well, when one occurs we order the membership back to work and we order that meetings be held and district representatives dispatched to the meetings to try to find out what the problem is and hopefully arrange a meeting with management so that the problem can be resolved.

* * *

1048 Q And were you aware of the authority to discipline members and locals for unauthorized work stoppages or for prolonging unauthorized work stoppages?

A Yes.

Q Are you personally acquainted, based upon your experience as a miner, with any efforts by the International to put into practice disciplinary procedures?

A I remember one instance of my own local.

Q What local was yours?

A 750.

Q And where was that, what company?

A This was at that time with Truax-Trayer Coal Company.

Q All right. Approximately when was this incident?

A This was in the mid '50's. I can't recall the exact year.

Q All right. What happened in connection with that incident or let me ask you first, was disciplinary action threatened or taken?

A Disciplinary action was threatened. We had a work stoppage and I can't remember who the District official

was who came to the local and threatened to rip down the charter and he was advised by the member-
1049 ship to go ahead and take it.

Q Did his threat to remove the charter — what effect did that have on the membership?

A I think it expanded and inflamed the membership and that particular strike lasted three weeks.

* * *

1051 Q Why, Mr. Miller, has the International under your direction and leadership not taken disciplinary action against individual members of the union or against individual locals of the union, especially during the period 1969 through 1973?

A Well, when there is a work stoppage, it is my judgment that the first priority is to resolve the work stoppage and get the mines back to work. It is also my opinion that in those cases that occur under my administration that if I took disciplinary action it would be inflammatory and would enlarge the work stoppage itself and my responsibility is to the industry and our membership and the general public.

1054 *Arnold Ray Miller*

CROSS EXAMINATION

Q Mr. Miller, when you took office as President of the International Union in December 1972 there was already in existence at that time a serious problem with unauthorized strikes in the union in the industry, was there not?

A Yes.

Q And of course the National Bituminous Coal Wage Agreement in effect at that time provided that all dis-

putes and local troubles would be settled through the grievance and arbitration procedures under the contract?

A Yes.

Q And it obligated the parties to maintain the integrity of the contract and to see that they were settled in that way, didn't it?

A Yes, both parties.

Q And the constitution of the United Mine Workers of America in effect at that time prohibited locals and their members from engaging in strikes that were not authorized by the International Union, did it not?

A Yes, sir.

Q But nevertheless, unauthorized strikes were
1055 occurring and occurring in large numbers, were they not?

A They were.

Q And isn't it true that that problem and the occurrence of unauthorized strikes had existed for a good many years prior to the time that you became the International President?

A Yes, sir.

Q As a matter of fact, the exhibits which you just looked at there, 91, 92 and 94 indicate that that problem went back to 1951 or perhaps that long ago, do they not?

A Yes.

Q I take it from what you have testified on direct examination that at the time you became the President of the International Union, the International did recognize and was recognizing that it had an obligation to stop and to try to prevent unauthorized strikes, is that true?

A Yes, we have been trying to do that.

Q You recognize that the International had that obligation both under the contract and under the Constitution of the International Union?

A I recognize that both parties have an obligation.

Q I take it from what you testified that at the time you became President of the International Union, that the policy and practice of the International was to have the districts within which unauthorized strikes occurred send district representatives to the mines where
1056 the strikes were occurring to try and persuade or direct the men back to work, is that right?

A The policy was to direct that the local union officials and its members hold a meeting with the district representative to attend that meeting and direct the men back to work and try to arrange a meeting with management if they would meet.

Q It was not a custom or a practice generally for the International Union to contact the local unions or their members directly in unauthorized work stoppages, was it?

A Well, the district is through the International. It has always been and that is the policy and that was the way it was transmitted down.

Q Were the actions that you have described of the locals in calling meetings and directing the members to return to work were those done at the direction of the International Union?

A Well, the general policy was that the local union officers had the responsibility to do it and so did the district and the international.

Q And did this method of attempting to deal with work stoppages continue as you have described it throughout the period from the time that you became President of the International in 1972 through the end of 1973?

A Yes. It has continued and improved once
1057 we got a commitment; I believe in 1973 we had to go to Court to get one operator to agree to meet when there was a problem.

Q But the practice and procedure that you have described of the districts arranging to have local union meetings and then sending the district representatives out to the meetings to direct the men to return to work, that same procedure continued throughout the time from the time you became President down to the end of 1973?

A Yes.

Q And it is your understanding that it had been the practice for years prior to the time you became President?

A Yes, sir.

Q Did you receive reports back from the district with respect to a success or lack of success that they had had at these local union meetings during unauthorized work stoppages?

A We get reports back.

Q Then you knew that there were numerous instances where the members of the local and the local paid no attention to the district's orders and continued on unauthorized work stoppages despite the orders of the district to the contrary, didn't you?

A Yes.

Q Were you also aware that it was the practice and in most instances was the case that the local union officers themselves did not return to work when
1058 the men didn't return to work after being ordered to do so by the district representative?

A The local union officers would not cross a picket line, if that would be the case.

* * *

Q Now, weren't there many instances then in which there were no pickets involved from other locals and still the officers and the men alike continued in the work stoppage after they had been told by the district representatives to return to work one or more times?

A I won't agree that there are many. There are instances where that occurred.

Q And these were reported to you?

A Yes.

1059 Q Were you aware as evidence in this case shows that sometimes local union meetings were held day after day after day repeatedly during an unauthorized work stoppage and the men continued to decline to return to work?

A There has been many meetings on several instances in an effort to get the mine back into operation.

Q And isn't it also a fact that you were aware that there were instances where when the men finally did return to work they engaged in another similar unauthorized work stoppage within a few days or weeks or months thereafter?

A I don't know of many cases of that. There have been a few isolated cases I know about.

Q Don't you know that some of these local unions, for example, in District 17 including locals at Carbon Fuel, have been repeatedly engaged in unauthorized work stoppages, sometimes a half dozen times in a single year or more?

A I know of some of the problems with this particular company because I live in the area. I know very well the problems we have with that particular operator.

THE COURT: I don't believe that answer was responsive. The question is do you know of instances where in a year's time a single local would walk out as much as a half dozen times.

A Yes.

1060 BY MR. JOHNSON:

Q So getting back to work once even when you were able to do it, was no solution to the problem, was it, Mr. Miller?

A No, I don't always have all these solutions.

Q And in that May 17, 1956 UMWA policy declaration, which is Plaintiff's Exhibit No. 94 (indicating) the International Executive Board, I think, as you will see, made the statement with respect to the unauthorized work stoppages that were occurring at that time that "These local unions and the membership thereof are defiant of the union and imperil the welfare of all other members."

Would you say that that is a fair characterization of the situation where the locals and their members refused to obey the orders of the district and have refused repeatedly to return to work?

A That is a fair characterization of what really happened without knowing the facts.

Q Has the International Union or District 17 to your knowledge done anything to enforce or back up its statements or directions at these local union meetings with respect to returning to work during unlawful work stoppages or ceasing to engage in such unlawful work stoppages?

A I believe we have done everything that was possible to be done without further aggravating the
1061 situation and causing it to expand. That's my judgment.

Q But you haven't done anything, have you, other than to send out over and over again the district representatives to tell them to return to work?

A I have come down myself and personally got involved and got some of the problems resolved, to find out what the real problem was.

Q Have you appeared at any of these local union meetings involving Carbon Fuel Company during the period 1969 through 1973?

A Not through 1973, but I have appeared at the local unions of that company.

Q Is it not obvious to you, Mr. Miller, that the means that have heretofore been taken by the International with respect to these work stoppages which you have described and which consist as I understand it of holding local union meetings and sending district representatives to urge the men to return to work, have been largely futile and unsuccessful in dealing with the strike problem?

A As I said earlier, it is not a one way street. It isn't something that I can resolve and find answers to all

the problems without some response from the industry itself.

Q But the methods that have been used by the union, by the International Union and by the district to
1062 this time have not been successful, have they?

A Not totally, no, sir.

Q But there has been no instance when any disciplinary action against locals or members was taken during the period 1969 through 1973, was there?

A I don't know of any instance that disciplinary action would have resolved the problem, and it is my opinion it would have further inflamed the problem and would have blown it all out of proportion.

Q I understood you testified that, but the answer is "No, nothing has been done of the disciplinary nature", isn't that true?

A Well, I wouldn't go so far as to say nothing has been done. I have not, in my judgment, taken what could be considered drastic steps, because I just don't think it would be successful.

Q Has anybody been—any member or any local been fined by the International for engaging in unauthorized work stoppages, no matter how numerous?

A No, sir. Not to my knowledge. There might have been years past. There was an attempt, but not at the locals where I worked, and it was not successful then.

Q To your knowledge, during the period from 1969 through 1973, no action of that kind was taken by the International Union, was it?

1063 A I couldn't say that no action was taken by the International then because at that particular

time I had no intimate knowledge of the workings of the International Union.

Q To the best of your knowledge?

A It did not occur in the local I was in, just one local union.

Q And no charter of any local to your knowledge during that period of time was lifted or any provisional government established by the union as the constitution provided at that time, was there?

A There was an attempt to lift the charter in my own local union but it was not done.

Q Well, there was a threat to do it, is that what you're saying?

A Yes, that there was a threat to do it.

Q You mentioned when Mr. McIntyre, I believe, asked you if any disciplinary action had been taken since you were President of the International, that you referred to an incident in March of 1973 that involved disciplinary action against Joe Ellis?

A Yes, sir.

Q Now, that action did not—with respect to Mr. Ellis—was not because of any work stoppage that Mr. Ellis had called or participated in, was it?

1064 A No. But it was still disciplinary action.

Q But it related to something else internal to the union, not to the work stoppage problem.

A Well, he defied an order.

Q But the order wasn't to tell somebody to go back to work or try to end a strike or anything like that, was it?

A No, sir.

* * *

Q Specifically, Mr. Miller, the United Mine Workers Constitution in effect in those years, 1969 through 1973, which is Plaintiff's Exhibit No. 34, which I will show you so you can follow it, provided in Article 20, Section 9 — that's Article XX, Section 9 — that any member or members engaged in an unauthorized work stoppage resulting in shutting down a mine shall after due
1065 notice and hearing upon conviction suffer such penalty as may be imposed upon them by the respective district organizations.

That, during the period 1969 through 1973, at least, was never utilized or resorted to by the International or by District 17.

* * *

A From 1969 to December 22, 1972 I had no intimate knowledge of the inner workings of the International Union except through the local I was in and the neighboring locals. I heard talk that there was efforts made to invoke this section here. I don't know of those instances, but I also don't know that anytime that it was invoked and worked. I've already said there was a threat to lift the charter in my own local union and the membership told the district rep. — I can't recall exactly who it was — that he could take it down and take it with him.

And it's my opinion because I was a member of that local that that further aggravated the problem there and did not resolve it.

1066 Q But the answer is no, that so far as you know from your own personal knowledge it was never done?

A As far as I know, no.

Q And certainly during the time that you were the President down to the end of 1973, you know that it was never done, don't you?

A That's right, because I didn't think it would work.

Q But you didn't try it, didn't you?

A Well, certainly I wasn't going to try it if my judgment led me to believe it was going to further aggravate the situation. I don't think that would be responsible action on my part.

Q Under the United Mine Workers of America Constitution that was in effect during the period in question — that is from the time you became President of the International Union down to the end of 1973, Article III, Section 1 provided that the International Union shall have supreme legislation, executive and judicial authority over all members and subordinate branches, isn't that right?

A Yes, sir.

Q Did the number or frequency of strikes in a particular local union have anything whatsoever
1067 to do with a particular action that the International or the Districts took with respect to strikes in that local?

A I think the seriousness of the problem and the breach was probably of more importance than anything else to me at that time. That's what I've tried to do since I became President of this union is find out what the cause was and eliminate the cause regardless of who was responsible.

Q But no matter how frequent these strikes, isn't it true that all that was ever done with respect to that local was to send out a district representative to attend a local union meeting and tell them to go back to work over and over and over again?

A I never made an assessment that any other action on my part was appropriate or would resolve the problem.

Q Do you agree that in many instances only a majority of the members and sometimes a small minority of the members in a local really wanted to strike in these unauthorized strikes?

A There is always a minority of the membership of any organization, and particularly the locals, that are more vocal than others. I could not make an assessment that there is a small minority that would prevail in all cases.

Q Do you know that it is a fact that in many instances only a few members of a local have succeeded in bringing the whole local union out on strike?

1068 A Yes.

BY MR. JOHNSON:

Q I believe you've answered that question?

A Yes.

Q You said yes?

A Yes.

Q Now, in those situations, what efforts, if any, and what action, if any, has been taken by the International or the District Union to identify and learn the identity of those individuals who caused the strike?

* * *

1069 A Well, we have not been able to determine who they are. We haven't made any effort to get their names because I firmly believe it would be impossible to get the names or you're going to be asking the membership to violate their oath of obligation and in a sense inform on their own fellowman and the tradition in the Mine Workers certainly has been of longstanding that is something that an exercise in futility to expect someone to do it because they won't do it.

Q You are saying to your knowledge no action has been taken to identify, is that right?

A Yes.

Q Are you saying that if the International and the District Union went to the local union officers and said, "Who are the individuals in the local who advocated this strike, or who instigated this strike?" that because of the sense of brotherhood in the union, that the officers of the local wouldn't tell the District and the International?

* * *

1070 A What you are saying, if that was to happen, would in my judgment precipitate perhaps violence, if I were to ask the local officers to do that and they would do it. And it has not been my judgment so far that that would really resolve the problem.

I think my highest responsibility is to fulfill our commitment and try to get these problems over.

Q Have you ever, to your knowledge, or has the International or the District, ever asked the local union officers or anybody in the local who the instigators of a particular work stoppage were?

A I have inadvertently asked myself before I realized what I was doing and the answer was, no, they would not tell.

Q Now with respect to picketing situations, it is also true that very few individuals from a local union can bring about and prolong a work stoppage by picketing at shift change times and shut down the mine. Isn't that true?

A Yes.

Q And in this fashion, there have been strikes that involved a great many locals that began at one particular local and were spread to the other locals by picketing activity. Isn't that true?

A That's true when there is sufficient awareness of what the problem is.

1071 Q Now, what action, if any, has the International Union taken to learn the identity of the pickets and who the individuals are who are involved in that picketing and particularly during the period 1969 through 1973?

A I don't know of any effort that has been made to determine who the individuals are by name. I have already stated that it would be an exercise in futility because no one would tell you.

Q So far as you know, no effort has ever been made to find out who they are?

A We've made efforts to find out who they are but to no avail.

Q Have you ever learned the names? Has the International learned the names of any persons who were engaged in picketing?

A Not to this point, we haven't.

* * *

1072 *Arnold Ray Miller*

REDIRECT EXAMINATION

BY MR. McINTYRE:

Q Mr. Miller, in response to Mr. Johnson's last inquiry of you. you say you have not issued any order directing your members to cross picket lines. Why have you not done so?

A Because it is my firm opinion based on lifetime of mining that this would precipitate violence.

Q What, if anything, would it do with regard to work stoppages?

A I don't think it would resolve the problem. I think it would further aggravate and inflame the situation and I think it would be all out of proportion.

Q You testified in response to one of Mr. Johnson's questions that — having to do with your obligations under the contract — that you as President of the International recognized that both parties had obligations. What did you mean by that answer, Mr. Miller?

A I mean the operators' representatives are the bargaining agents and we bargain on behalf of our membership, and when agreement is reached we both have a commitment to see that the contractual commitments are carried out and honored.

* * *

1076 *Arnold Ray Miller*

EXAMINATION BY THE COURT

THE COURT: I have just one question.

Mr. Miller. during the time you were President and up through 1963 —

MR. McINTYRE: Did you mean '73?

THE COURT: '73. Pardon me. Through '73. Every walkout involving Carbon Fuel of which you became aware, in your opinion, did the International Union make an earnest effort to get the matters or differences settled?

THE WITNESS: Yes, I think the International made as much effort as we could. You have to understand —

THE COURT: Now, when I say earnest effort, I really have in mind the language in the contract. You know what I'm talking about?

THE WITNESS: Yes, sir.

THE COURT: Do you think, having that in
1077 mind, the International made an earnest effort in every case of which you became aware to get the matter settled?

THE WITNESS: I think everything was done, Your Honor, that was possible to be done without further aggravating the situation and that's a judgment we have to make. I wish that I could give you more favorable response but some of the people we have to deal with, we've not reached that position yet. Now I'm hopeful that we will move some more progressively. We are making some progress. I never thought it was going to be easy to start with, Your Honor, and it hasn't been.

* * *

Portions of Plaintiffs Exhibits No. 17-32—
The Collective Bargaining Agreements

Exhibit No. 19

APPALACHIAN JOINT WAGE AGREEMENT

Effective April 1, 1941, to March 31, 1943

APPALACHIAN AGREEMENT

THIS AGREEMENT, made the 19th day of June, 1941, between the Central Pennsylvania Coal Producers' Association, Georges Creek and Upper Potomac Coal Association, Somerset County Coal Operators' Association, Western Pennsylvania Coal Operators' Association, Ohio Coal Association, Michigan Coal Operators' Association, Northern Panhandle of West Virginia Coal Operators' Association, Northern West Virginia Coal Association, Operators' Association of Williamson Field, Big Sandy-Elkhorn Coal Operators' Association, Hazard Coal Operators' Association, Kanawha Coal Operators' Association, Logan Coal Operators' Association, Southern Appalachian Coal Operators' Association, New River Coal Operators' Association, Pocahontas Operators' Association, Winding Gulf Operators' Association, Greenbrier Coal Operators' Association, Upper Buchanan Smokeless Coal Operators' Association, Harlan County Coal Operators' Association, and Virginia Coal Operators' Association, voluntary associations on behalf of each member thereof, hereinafter referred to as the Operators, party of the first part, and the International Union, United Mine Workers of America, and Districts 2, 3, 4, 5, 6, 16, 17, 19, 24, 28, 30 and 31, hereinafter referred to as the Mine Workers and on behalf of each member thereof, party of the second part. (New Districts of the United Mine Workers of America may be established in this territory.)

* * *

MAXIMUM HOURS AND WORKING TIME

* * *

HOLIDAYS

* * *

BASIC TONNAGE RATES

* * *

CHECKWEIGHMAN

* * *

BOYS

* * *

EXEMPTIONS UNDER THIS CONTRACT

* * *

MANAGEMENT OF MINES

* * *

MINE COMMITTEE

* * *

SETTLEMENT OF DISPUTES

* * *

DISCHARGE CASES

* * *

ILLEGAL SUSPENSION OF WORK

A strike or stoppage of work on the part of the Mine Workers shall be a violation of this Agreement. Under no circumstances shall the Operator discuss the matter under dispute with the Mine Committee or any representative of the United Mine Workers of America during suspension of work in violation of this Agreement.

IRREGULAR WORK

* * *

PREPARATION OF COAL AND MINING PRACTICE

* * *

VACATIONS WITH PAY

* * *

SAFETY PRACTICES

* * *

ENGINEER AND PUMPERS' DUTIES

* * *

SHIFTS

* * *

SENIORITY

* * *

PAY DAY

* * *

COKE AND CLEANING PLANTS

* * *

MEDICAL AND HOSPITALIZATION SERVICES

* * *

PHYSICAL EXAMINATION

* * *

HOUSE RENTS

* * *

MISCELLANEOUS PROVISIONS

* * *

DISTRICT CONFERENCES

* * *

PROTECTIVE WAGE CLAUSE

* * *

APPALACHIAN JOINT CONFERENCE

* * *

Exhibit No. 20

SOUTHERN WAGE AGREEMENT

Effective April 1, 1941, to March 31, 1943

SOUTHERN WAGE AGREEMENT

THIS AGREEMENT, made the 5th day of July, 1941, between the Operators' Association of Williamson Field, Big Sandy-Elkhorn Coal Operators' Association, Hazard Coal Operators' Association, Harlan County Coal Operators' Association, Kanawha Coal Operators' Association, Logan Coal Operators' Association, Southern Appalachian Coal Operators' Association, New River Coal Operators' Association, Pocahontas Operators' Association, Winding Gulf Operators' Association, Greenbrier Coal Operators' Association, Upper Buchanan Smokeless Coal Operators' Association, and Virginia Coal Operators' Association, voluntary associations on behalf of each member thereof hereinafter referred to as the Operators, party of the first part, and the International Union, United Mine Workers of America, and Districts 17, 19, 28 and 30, hereinafter referred to as the Mine Workers and on behalf of each member thereof, party of the second part. (New districts of the United Mine Workers may be established in this territory.)

WITNESSETH: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties as heretofore defined and set forth in this Agreement. It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the employes of the parties of the first part. It is agreed that as a condition of employment all employes shall be members of the United Mine Workers of America, except in those exempted classifications of employment as provided in this contract. (See

Note.) It is the intent and purpose of the parties hereto that this Agreement will promote an improved industrial and economic relationship in the bituminous coal industry, and to set forth herein the basic agreements covering rates of pay, hours of work, and conditions of employment to be observed between the parties in the following territory: Southern West Virginia, Virginia, Northern Tennessee, and that part of Kentucky lying east of a line drawn north and south through the City of Louisville.

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MAXIMUM HOURS AND WORKING TIME

* * *

HOLIDAYS

* * *

BASIC TONNAGE RATES

* * *

CHECKWEIGHMAN

* * *

BOYS

* * *

EXEMPTIONS UNDER THIS CONTRACT

* * *

MANAGEMENT OF MINES

* * *

MINE COMMITTEE

A committee of three (3) Mine Workers, who shall be able to speak and understand the English language, shall be elected at each mine by the Mine Workers employed at such mine. Each member of the Mine Committee shall be an employe of the mine at which he is a committee member, and shall be eligible to serve as a committee member only so long as he continues to be an employe

of said mine. The duties of the Mine Committee shall be confined to the adjustment of disputes arising out of this Agreement and the mine management and the Mine Worker, or Mine Workers, have failed to adjust. The Mine Committee shall have no other authority or exercise any other control, nor in any way interfere with the operation of the mine; for violation of this clause any or all members of the Committee may be removed from the Committee.

SETTLEMENT OF DISPUTES

Should differences arise between the Mine Workers and the Operator as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at any mine, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately:

First: Between the aggrieved party and the mine management;

Second: Through the management of the mine and the Mine Committee;

Third: By a Board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

Should the Board fail to agree, the matter shall be referred to an umpire selected by said Board. Should the Board be unable to agree on the selection of an umpire, he shall be designated by the International President of the United Mine Workers of America and the President of the Operators' Association affected. The decision of the umpire in any event shall be final.

District conferences may establish an intermediate board consisting of two (2) commissioners, one representing the Operators and one representing the Mine Workers with such powers as said Conference may delegate.

Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute; and a decision reached at any stage of the proceeding shall be binding on both parties hereto, and shall not be subject to reopening by any other party or branch of either association except by mutual agreement.

Expense and salary incident to the services of an umpire shall be paid jointly by the Operators and Mine Workers in each District.

DISCHARGE CASES

When a Mine Worker has been discharged from his employment and he believes he has been unjustly dealt with, it shall be a case arising under the method of settling disputes herein provided. In all discharge cases should it be decided under the rules of this Agreement that an injustice has been dealt the Mine Worker, the Operator shall reinstate and compensate him at the rate based on the earning of said Mine Worker prior to such discharge. Provided, however, that such case shall be taken up and disposed of within five days from the date of discharge.

ILLEGAL SUSPENSION OF WORK

A strike or stoppage of work on the part of the Mine Workers shall be a violation of this Agreement. Under no circumstances shall the Operator discuss the matter under dispute with the Mine Committee or any representative of the United Mine Workers of America during suspension of work in violation of this Agreement.

IRREGULAR WORK

* * *

PREPARATION OF COAL AND MINING PRACTICE

* * *

VACATIONS WITH PAY

* * *

SAFETY PRACTICES

* * *

ENGINEER AND PUMPERS' DUTIES

* * *

SHIFTS

* * *

SENIORITY

* * *

PAY DAY

* * *

COKE AND CLEANING PLANTS

* * *

MEDICAL AND HOSPITALIZATION SERVICES

* * *

PHYSICAL EXAMINATION

* * *

HOUSE RENTS

* * *

MISCELLANEOUS PROVISIONS

* * *

DISTRICT CONFERENCES

* * *

PROTECTIVE WAGE CLAUSE

* * *

JOINT SOUTHERN WAGE CONFERENCE

* * *

Exhibit No. 21

NATIONAL BITUMINOUS COAL WAGE AGREEMENT

Effective May 29, 1946, During the Period of Government Operation of Mines

AGREEMENT

THIS AGREEMENT between the Secretary of the Interior, acting as Coal Mines Administrator under the authority of Executive Order No. 9728 (dated May 21, 1946, 11 F. R. 5593), and the United Mine Workers of America, covers for the period of Government possession the terms and conditions of employment in respect to all mines in Government possession which were as of March 31, 1946, subject to the National Bituminous Coal Wage Agreement, dated April 11, 1945.

1. Provisions of National Bituminous Coal Wage Agreement Preserved

Except as amended and supplemented herein, this Agreement carries forward and preserves the terms and conditions contained in all joint wage agreements effective April 1, 1941, through March 31, 1943, the supplemental agreement providing for the six (6) day work week, and all the various district agreements executed between the United Mine Workers and the various Coal Associations and Coal Companies (based upon the aforesaid basic agreement) as they existed on March 31, 1943, and the National Bituminous Coal Wage Agreement, dated April 11, 1945.

2. Mine Safety Program

* * *

3. Workmen's Compensation and Occupational Disease

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4. Health and Welfare Program

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5. Survey of Medical and Sanitary Facilities

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6. Wages

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7. Vacation Payment

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8. Settlement of Disputes

Upon petition filed by the United Mine Workers with the Coal Mines Administrator showing that the procedure for the adjustment of grievances in any coal producing district is inequitable in relation to the generally prevailing standard of such procedures in the industry, the Coal Mines Administrator will direct the operating managers at mines in the district shown to have an inequitable grievance procedure to put into effect within a reasonable period of time the generally prevailing grievance procedure in the industry.

9. Discharge Cases

The Coal Mines Administrator will carry out the provision in agreements which were in effect on March 31, 1946, between coal mine operators and the United Mine Workers that cases involving the discharge of employees for cause shall be disposed of within 5 days.

10. Fines and Penalties

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11. Supervisors

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12. Safety

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13. Retroactive Wage Provisions

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14. Effective Date

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Exhibit No. 22

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1947

Effective July 1, 1947, to June 30, 1948

THIS AGREEMENT, made this 7th day of July, 1947, by and between the coal operators and associations signatory hereto hereinafter referred to as Operators, parties of the first part, and the International Union, United Mine Workers of America, hereinafter referred to as Mine Workers, on behalf of each member thereof, party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements previous agreements as herein provided. This Agreement (subject to the amendments, modifications and supplements as hereinafter provided) carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941), effective April 1, 1941, to March 31, 1943, the Supplemental Six-Day Work Week Agreement, the National Bituminous Coal Wage Agreement (dated April 11, 1945), effective April 1, 1945, and all the various District Agreements executed between the United Mine Workers of America and the various Operators and Coal Associations (based upon the aforesaid basic agreements) as they existed on March 31, 1946, subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out.

WITNESSETH: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties, as defined and set forth in this Agreement. It

is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the employees of the parties of the first part. It is further agreed that as a condition of employment all employees shall be or become, members of the United Mine Workers of America, except in those exempted classifications of employment as hereinafter provided in this Agreement. This provision does not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood. It is the intent and purpose of the parties hereto that this Agreement will promote and improve industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement during such time as such persons are able and willing to work.

EXEMPTIONS UNDER THIS AGREEMENT

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MINE SAFETY PROGRAM

* * *

WORKMEN'S COMPENSATION AND OCCUPATIONAL DISEASES

* * *

United Mine Workers of America

WELFARE AND RETIREMENT FUND

* * *

WAGES AND HOURS

* * *

VACATION PAYMENT

* * *

CHECKOFF

* * *

DISTRICT AGREEMENTS

New Districts of the United Mine Workers of America may be established.

This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference; and all local agreements, rules, regulations and customs heretofore established in conflict with this Agreement are hereby abolished. Prior practic and custom not in conflict with this Agreement may be continued, but any provisions in District or Local Agreements providing for the levying, assessing or collecting of fines or providing for "no strike," "indemnity" or "guarantee" clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this Agreement. Wherever a conflict arises between this Agreement and any District or Local Agreement, this Agreement shall prevail. When day men are transferred to loading coal the individual affected, if aggrieved, shall have the right of review under the settlement of disputes procedures provided in this Agreement.

No District Contract or Agreement negotiated hereunder shall become effective until approval of such Contract or Agreement by the International Union, United Mine Workers of America, has been first obtained.

SETTLEMENT OF LOCAL AND DISTRICT DISPUTES

Should differences arise between the Mine Workers and the Operators as to the meaning and application of

the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall ge made to settle such differences immediately:

1. Between the aggrieved party and the mine management.

2. Through the management of the mine and the Mine Committee.

3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement.

HOUSE COAL

* * *

MISCELLANEOUS

1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any "no strike" or "Penalty" clause or clauses or any clause denominated "Illegal Suspension of Work" are hereby rescinded, cancelled, abrogated and made null and void.

2. Any and all provisions of any contracts or agreements between the parties hereto or some of them, whether National, District, Local or otherwise, providing for a protective wage clause and a modification of this Agreement or said agreements if a more favorable wage agreement is entered into by the United Mine Workers of America, are hereby rescinded, cancelled, abrogated and made null and void.

3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the "Settlement of Local and District Disputes" section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry.

TERMINATION OF AGREEMENT

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NATIONAL CONFERENCES

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INTEGRATED INSTRUMENT

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Exhibit No. 23

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1948

Effective July 1, 1948, to June 30, 1949
Executed at Washington, D. C., June 25, 1948

THIS AGREEMENT, made this 25th day of June, 1948, by and between the coal operators and associations signatory hereto hereinafter referred to as Operators, parties of the first part, and the International Union, United Mine Workers of America, hereinafter referred to as Mine Workers, on behalf of each member thereof, party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements previous agreements as herein provided. This Agreement (subject to the amendments, modifications and supplements as hereinafter provided) carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941), effective April 1, 1941, to March 31, 1943, the Supplemental Six-Day Work Week Agreement, the National Bituminous Coal Wage Agreement (dated April 11, 1945), effective April 1, 1945, the National Bituminous Coal Wage Agreement of 1947 (dated July 8, 1947), effective July 1, 1947, and all the various District Agreements executed between the United Mine Workers of America and the various Operators and Coal Associations (based upon the aforesaid basic agreements) as they existed on June 30, 1948, subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out.

UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND

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WAGES AND HOURS

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VACATION PAYMENT

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TERMINATION OF AGREEMENT

* * *

INTEGRATED INSTRUMENT

* * *

Exhibit No. 24

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950

Effective March 5, 1950, to June 30, 1952
Executed at Washington, D. C., March 5, 1950

THIS AGREEMENT, made this 5th day of March, 1950, by and between the coal operators and associations signatory hereto hereinafter referred to as Operators, parties of the first part, and the International Union, United Mine Workers of America, hereinafter referred to as Mine Workers, on behalf of each member thereof, party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements previous agreements as herein provided. This Agreement (subject to the amendments, modifications and supplements as hereinafter provided) carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941) effective April 1, 1941, to March 31, 1943, the Supplemental Six Day Work Week Agreement, the National Bituminous Coal Wage Agreement (dated April 11, 1945) effective April 1, 1945, and all the various District Agreements executed between the United Mine Workers of America and the various Operators and Coal Associations (based upon the aforesaid basic agreements)

as they existed on March 31, 1946, subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out.

WITNESSETH: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties, as defined and set forth in this Agreement. It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the employees of the parties of the first part. It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law, except in those exempted classifications of employment as hereinafter provided in this agreement. This provision does not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood. It is the intent and purpose of the parties hereto that this agreement will promote and improve industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement.

EXEMPTIONS UNDER THIS AGREEMENT

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MINE SAFETY PROGRAM

* * *

WORKMEN'S COMPENSATION AND OCCUPATIONAL DISEASES

* * *

UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950

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WAGES AND HOURS

* * *

VACATION PAYMENT

* * *

CHECKOFF

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DISTRICT AGREEMENTS

* * *

This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference; and all local agreements, rules, regulations and customs heretofore established in conflict with this Agreement are hereby abolished. Prior practice and custom not in conflict with this Agreement may be continued, but any provisions in District or Local Agreements providing for the levying, assessing or collecting of fines or providing for "no strike," "indemnity" or "guarantee" clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this Agreement. Wherever a conflict arises between this Agreement and any District or Local Agreement, this Agreement shall prevail. When day men are transferred to loading coal the individual affected, if aggrieved, shall have the right of review under the settlement of disputes procedures provided in this Agreement.

* * *

SETTLEMENT OF LOCAL AND DISTRICT DISPUTES

Should differences arise between the Mine Workers and the Operators as to the meaning and application of

the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

1. Between the aggrieved party and the mine management.

2. Through the management of the mine and the Mine Committee.

3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement.

HOUSE COAL

* * *

MISCELLANEOUS

1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any "no strike" or "Penalty" clause or clauses or any clause denominated "Illegal Suspension of Work" are hereby rescinded, cancelled, abrogated and made null and void.

2. Any and all provisions of any contracts or agreements between the parties hereto or some of them whether National, District, Local or otherwise providing for a protective wage clause and a modification of this Agreement or said agreements if a more favorable wage agreement is entered into by the United Mine Workers of America, are hereby rescinded, cancelled, abrogated and made null and void.

3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the "Settlement of Local and District Disputes" section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry.

4. The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to

prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement.

TERMINATION OF AGREEMENT

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NATIONAL CONFERENCES

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INTEGRATED INSTRUMENT

* * *

Exhibit No. 25

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950 AS AMENDED JANUARY 18th, 1951

Effective February 1, 1951

WHEREAS on March 5, 1950, and at various dates subsequent thereto certain coal associations and companies (generally referred to as Operators), in their association and company names and capacities, executed with the United Mine Workers of America the National Bituminous Coal Wage Agreement of 1950 (dated March 5, 1950); and subsequent to becoming signatories to said Agreement many of said signatory operators affiliated with and became members of a newly created Association denominated and known as the "Bituminous Coal Operators' Association" and authorized said Association by and through its President, Harry M. Moses, to officially represent said members, companies and associations in the negotiation of wage agreements with the United Mine Workers of America; and,

WHEREAS said "Bituminous Coal Operators' Association," in behalf of each and all of its members of every kind and character (whether association, company, partnership or individual) has negotiated with the United Mine Workers of America certain amendments to said National Bituminous Coal Wage Agreement of 1950;

NOW, THEREFORE, THIS AGREEMENT made this 18th day of January, 1951, by and between the Bituminous Coal Operators' Association (for and on behalf of each of the named and described associations and companies listed in "Appendix A," hereto attached and made a part hereof) and by and between such other and additional associations, companies and operators as may hereafter become signatory hereto, hereinafter referred to as "Operators," as parties of the first part, and the International Union, United Mine Workers of America, hereinafter referred to as "Mine Workers," on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, and, as amended, carries forward and preserves the terms and conditions of the National Bituminous Coal Wage Agreement of 1950, such amendments, being as follows, to wit:

WAGES

* * *

TERMINATION OF AGREEMENT

* * *

Exhibit No. 26

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950 AS AMENDED SEPTEMBTR 29, 1952

Effective October 1, 1952

WHEREAS on January 18, 1951, and at various dates subsequent thereto, certain coal associations, companies and individuals (generally referred to as "Operators"), in their association, company and individual names and capacities, executed with the United Mine Workers of America an Agreement denominated "National Bituminoue Coal Wage Agreement of 1950 as Amended January 18th, 1951"; and said Operators, signatory to this Agreement, have now negotiated with the United Mine Workers of America certain additional amendments to said "National Bituminous Coal Wage Agreement of 1950" and it is the agreement and intent of all parties hereto to amend, and as amended, carry forward and preserve the terms and conditions of said "National Bituminous Coal Wage Agreement of 1950" and all previous Agreements as therein provided:

NOW, THEREFORE, THIS AGREEMENT made this 29th day of September, 1952, by and between the coal operators, associations, companies and individuals signatory hereto (hereinafter referred to as "Operators"), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as "Mine Workers") on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950" and all previous agreements as therein provided, such amendments, modifications and supplements being as follows, to wit:

MINE SAFETY PROGRAM

* * *

UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950

* * *

WAGES

* * *

VACATION PAYMENT

* * *

SENIORITY

* * *

APPLICATION OF CONTRACT TO COAL LANDS

* * *

HOUSE COAL

* * *

MISCELLANEOUS

Amend "Miscellaneous" by striking out subsection 4 and amending subsection 3 to read as follows:

"3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts."

Amend "Miscellaneous" by adding thereto the following, to become subsection 4:

"4. Each operator signatory or who may become signatory hereto hereafter agrees to give proper notice to the President of the local union at the mine by the 18th day of each month that said Operator has made the required payment to the United Mine Workers of America Welfare and Retirement Fund for the previous month."

TERMINATION OF AGREEMENT

* * *

Exhibit No. 27

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950 AS AMENDED EFFECTIVE SEPT. 1, 1955

WHEREAS on September 29, 1952, and at various dates subsequent thereto, certain coal associations, companies and individuals (generally referred to as "Operators"), in their association, company and individual names and capacities, executed with the United Mine Workers of America an Agreement denominated "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952"; and said Operators, signatory to this Agreement, have negotiated with the United Mine Workers of America certain additional amendments to said "National Bituminous Coal Wage Agreement of 1950" and it is the agreement and intent of all parties hereto to amend and supplement and as amended and supplemented to carry forward and preserve the terms and conditions of said "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952", said "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided:

NOW, THEREFORE, THE AGREEMENT, effective September 1, 1955, by and between the coal operators, associations, companies and individuals signatory hereto and by and between such other and additional associations, companies and individuals as may hereafter become signatory hereto (hereinafter referred to as "Operators"), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as "Mine Workers") on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and pre-

serves the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952", the "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided, such amendments, modifications and supplements being as follows, to wit:

WAGES AND HOURS

* * *

VACATION PAYMENT

* * *

TERMINATION OF AGREEMENT

* * *

Exhibit No. 28

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950 AS AMENDED EFFECTIVE OCT. 1, 1956

WHEREAS on September 29, 1952, and at various dates subsequent thereto, certain coal associations, companies and individuals (generally referred to as "Operators"), in their association, company and individual names and capacities, executed with the United Mine Workers of America an Agreement denominated "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952"; and said Operators, signatory to this Agreement, have now negotiated with the United Mine Workers of America certain additional amendments to said "National Bituminous Coal Wage Agreement of 1950" and it is the agreement and intent of all parties hereto to amend and supplement and as amended and supplemented to carry forward and preserve the terms and conditions of said "National Bitumous Coal Wage Agreement of 1950 as Amended September 29th, 1952", said "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided:

NOW, THEREFORE, THIS AGREEMENT, effective October 1, 1956, by and between the coal operators, associations, companies and individuals signatory hereto and by and between such other and additional associations, companies and individuals as may hereafter become signatory hereto (hereinafter referred to as "Operators"), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as "Mine Workers") on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952", the "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided, such amendments, modifications and supplements being as follows, to wit:

WAGES AND HOURS

* * *

VACATION PAYMENT

* * *

TERMINATION OF AGREEMENT

* * *

Exhibit No. 29

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950 AS AMENDED EFFECTIVE DEC. 1, 1958

WHEREAS on September 29, 1952, and at various dates subsequent thereto, certain coal associations, companies and individuals (generally referred to as "Operators"), in their association, company and individual names and capacities, executed with the United Mine Workers of America an Agreement denominated "Na-

tional Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952"; and said Operators, signatory to this Agreement, have now negotiated with the United Mine Workers of America certain additional amendments to said "National Bituminous Coal Wage Agreement of 1950" and it is the agreement and intent of all parties hereto to amend and supplement and as amended and supplemented to carry forward and preserve the terms and conditions of said "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952", said "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided:

NOW, THEREFORE, THIS AGREEMENT, effective December 1. 1958, by and between the coal operators, associations, companies and individuals signatory hereto and by and between such other and additional associations, companies and individuals as may hereafter become signatory hereto (hereinafter referred to as "Operators"), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as "Mine Workers") on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950 as amended September 29th, 1952", the "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided, such amendments, modifications and supplements being as follows, to wit:

WAGES AND HOURS

* * *

PROTECTIVE WAGE CLAUSE

* * *

VACATION PAYMENT

* * *

TERMINATION OF AGREEMENT

* * *

Exhibit No. 30

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950 AS AMENDED EFFECTIVE APRIL 2, 1964

WHEREAS on September 29, 1952, and at various dates subsequent thereto, certain coal associations, companies and individuals (generally referred to as "Operators"), in their association, company and individual names and capacities, executed with the United Mine Workers of America an Agreement denominated "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952"; and said Operators, signatory to this Agreement, have now negotiated with the United Mine Workers of America certain additional amendments to said "National Bituminous Coal Wage Agreement of 1950" and it is the agreement and intent of all parties hereto to amend and supplement and as amended and supplemented to carry forward and preserve the terms and conditions of said "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952", said "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided:

NOW, THEREFORE, THIS AGREEMENT, effective April 2, 1964, by and between the coal operators, associations, companies and individuals signatory hereto and by and between such other additional associations, companies and individuals as may hereafter become signatory hereto (hereinafter referred to as "Operators"), as

parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as "Mine Workers") on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950 as amended September 29th, 1952", the "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided, such amendments, modifications and supplements being as follows, to wit:

MINE SAFETY PROGRAM

* * *

UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950

* * *

APPLICATION OF CONTRACT TO COAL LANDS

* * *

WAGES AND HOURS

* * *

VACATION PAYMENT

* * *

SETTLEMENT OF LOCAL AND DISTRICT DISPUTES

Amend the "SETTLEMENT OF LOCAL AND DISTRICT DISPUTES" section of the National Bituminous Coal Wage Agreement of 1950 by striking out all of said section below the caption and inserting in lieu thereof the following:

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of

the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately.

1. Between the aggrieved party and the mine management.

2. Through the management of the mine and the Mine Committee.

3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators. Neither the Mine Workers' representatives on the board nor the Operators' representatives on the board shall be the same persons who participated in steps (1), (2), or (3) of this procedure.

5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

DISCHARGE CASES

Amend the "DISCHARGE CASES" section of the Appalachian Joint Wage Agreement of June 19, 1941, as carried forward in the National Bituminous Coal Wage Agreement of 1950 by striking all of the language of that section and substituting the following:

"When a mine worker has been discharged from his employment and he believes he has been unjustly dealt with, it shall be a case under the 'Settlement of Local and District Disputes' clause. In all discharge cases should it be decided under the rules of this Agreement that an injustice has been dealt the mine worker, the Operator shall reinstate and compensate him at the rate based on the earning of said mine worker prior to such discharge. Provided, however, that such case shall be taken up within five days from the date of discharge."

SENIORITY

* * *

BATHHOUSE OR WASHROOM

* * *

HELPERS

* * *

NEW MACHINERY

* * *

TERMINATION OF AGREEMENT

* * *

Exhibit No. 31

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950 AS AMENDED EFFECTIVE APRIL 1, 1966

WHEREAS on September 29, 1952, and at various dates subsequent thereto, certain coal associations, companies and individuals (generally referred to as "Operators"), in their association, company and individual names and capacities, executed with the United Mine Workers of America an Agreement denominated "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952"; and said Operators, signatory to this Agreement, have now negotiated with the United Mine Workers of America certain additional amendments to said "National Bituminous Coal Wage Agreement of 1950" and it is the agreement and intent of all parties hereto to amend and supplement and as amended and supplemented to carry forward and preserve the terms and conditions of said "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952", said "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided:

NOW, THEREFORE, THIS AGREEMENT, effective April 1, 1966, by and between the coal operators, associations, companies and individuals signatory hereto and by and between such other and additional associations, companies and individuals as may hereafter become signatory hereto (hereinafter referred to as "Operators"), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as "Mine Workers") on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952", the "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as

therein provided, such amendments, modifications and supplements being as follows, to wit:

MINE SAFETY PROGRAM

* * *

UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950

* * *

APPLICATION OF CONTRACT TO COAL LANDS

* * *

WAGES AND HOURS

* * *

VACATION PAYMENT

* * *

SETTLEMENT OF LOCAL AND DISTRICT DISPUTES

Amend the "SETTLEMENT OF LOCAL AND DISTRICT DISPUTES" section of the National Bituminous Coal Wage Agreement of 1950 by striking out all of said section below the caption and inserting in lieu thereof the following:

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or should any local trouble of any kind arise at the mine. an earnest effort shall be made to settle such differences immediately.

1. Between the aggrieved party and the mine management.

2. Through the management of the mine and the mine committee.

3. Through district representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators. Neither the Mine Workers' representatives on the board nor the Operators' representatives on the board shall be the same persons who participated in steps (1), (2), or (3) of this procedure.

5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

DISCHARGE CASES

Amend the "DISCHARGE CASES" section of the Appalachian Joint Wage Agreement of June 19, 1941, as carried forward in the National Bituminous Coal Wage Agreement of 1950 by striking all of the language of that section and substituting the following:

"When a mine worker has been discharged from his employment and he believes he has been unjustly dealt

with, it shall be a case under the 'Settlement of Local and District Disputes' clause. In all discharge cases should it be decided under the rules of this agreement that an injustice has been dealt the mine worker, the operator shall reinstate and compensate him at the rate based on the earning of said mine worker prior to such discharge. Provided, however, that such case shall be taken up within five days from the date of discharge."

SENIORITY

* * *

BATHHOUSE OR WASHROOM

* * *

BULLETIN BOARDS

* * *

COMPULSORY RETIREMENT

* * *

HELPERS

* * *

JURY DUTY

* * *

NEW MACHINERY

* * *

TONNAGE RATES

* * *

WORK JURISDICTION

* * *

TERMINATION OF AGREEMENT

* * *

Exhibit No. 17

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1968

Effective October 1, 1968

THIS AGREEMENT, made this 14th day of October, 1968, by and between the coal operators and associations signatory hereto, hereinafter referred to as Operators, parties of the first part, and the International Union, United Mine Workers of America, hereinafter referred to as Mine Workers, on behalf of each member thereof, party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies, and supplements previous agreements as herein provided. This agreement (subject to the amendments, modifications and supplements as hereinafter provided) carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941) effective April 1, 1941, to March 31, 1943, the Supplemental Six Day Work Week Agreement, the National Bituminous Coal Wage Agreement (dated April 11, 1945) effective April 1, 1945, and all the various district agreements executed between the United Mine Workers of America and the various operators and coal associations (based upon the aforesaid basic agreements) as they existed on March 31, 1946, subject to the terms and conditions of this agreement and as amended, modified and supplemented by this agreement as herein set out.

WITNESSETH: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties, as defined and set forth in this agreement. It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency

representing the employees of the parties of the first part. It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law, except in those exempted classifications of employment as hereinafter provided in this agreement. This provision does not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood. It is the intent and purpose of the parties hereto that this agreement will promote and improve industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this agreement.

EXEMPTIONS UNDER THIS AGREEMENT

* * *

MINE SAFETY PROGRAM

* * *

WORKMEN'S COMPENSATION AND OCCUPATIONAL DISEASES

* * *

UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950

* * *

APPLICATION OF CONTRACT TO COAL LANDS

* * *

WAGES AND HOURS

* * *

VACATION PAYMENT

* * *

CHECKOFF

* * *

SETTLEMENT OF LOCAL AND DISTRICT DISPUTES

Should differences arise between the Mine Workers and the operators as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately: (The parties will not be represented by legal counsel at any of the steps below.)

1. Between the aggrieved party and the mine management.

2. Through the management of the mine and the mine committee.

3. Through district representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the operators. Neither the Mine Workers' representatives on the board nor the operators representatives on the board shall be the same persons who participated in steps (1), (2), or (3) of this procedure.

5. Should the board fail to agree the matter shall, within (20) days after decision by the board, be referred to an umpire to be mutually agreed upon by the operator or operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire

shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the operator or operators affected and by the Mine Workers.

A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement.

DISCHARGE CASES

Amend the "DISCHARGE CASES" section of the Appalachian Joint Wage Agreement of June 19, 1941, by striking all of the language of that section and substituting the following:

When a mine worker has been discharged from his employment and he believes he has been unjustly dealt with, it shall be a case under the "Settlement of Local and District Disputes" clause. In all discharge cases should it be decided under the rules of this agreement that an injustice has been dealt the mine worker, the operator shall reinstate and compensate him at the rate based on the earning of said mine worker prior to such discharge. Provided, however, that such case shall be taken up within five days from the date of discharge.

SENIORITY

* * *

BATHHOUSE OR WASHROOM

* * *

BULLETIN BOARDS

* * *

CHRISTMAS BONUS

* * *

CLASSIFICATION REQUIREMENT

* * *

CLASSIFIED WORK

* * *

COMPULSORY RETIREMENT

* * *

HELPERS

* * *

HOUSE COAL

* * *

JURY DUTY

* * *

NEW MACHINERY

* * *

PAY DAY

* * *

STRIPPING CREWS

* * *

TONNAGE RATES

* * *

WORK JURISDICTION

* * *

CONSTRUCTION WORK

* * *

JOINT COMMISSION ON WAGE RATES

* * *

DISTRICT AGREEMENTS

* * *

This agreement supersedes all existing and previous contracts except as incorporated and carried forward

herein by reference; and all local agreements, rules, regulations and customs heretofore established in conflict with this agreement are hereby abolished. Prior practice and custom not in conflict with this agreement may be continued, but any provisions in district or local agreements providing for the levying, assessing or collecting of fines or providing for "no strike," "indemnity" or "guarantee" clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this agreement. Wherever a conflict arises between this agreement and any district or local agreement, this agreement shall prevail. When day men are transferred to loading coal the individual affected, if aggrieved, shall have the right of review under the settlement of disputes procedures provided in this agreement.

* * *

MISCELLANEOUS

1. Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any "no strike" or "penalty" clause or clauses of any clause denominated "Illegal Suspension of Work" are hereby rescinded, cancelled, abrogated and made null and void.

* * *

3. The United Mine Workers of America and the operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" section of this agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore

practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts.

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NATIONAL CONFERENCES

* * *

INTEGRATED INSTRUMENT

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TERMINATION OF AGREEMENT

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Exhibit No. 19

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1971

Effective November 12, 1971

The National Bituminous Coal Wage Agreement of 1971 contains those provisions in effect September 30, 1971 of the Appalachian Joint Wage Agreement (1941); Supplemental Six Day Work Week Agreement (1943); National Bituminous Coal Wage Agreement (1945); National Bituminous Coal Wage Agreement of 1968.

Note: Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any "no strike" or "penalty" clause or clauses or any clause denominated "Illegal Suspension of Work" are hereby rescinded, cancelled, abrogated and made null and void.

Article I—ENABLING CLAUSE

THIS AGREEMENT made this 12th day of November 1971, between the coal operators and associations signatory hereto, as parties of the first part (each coal operator which is a signatory hereto called "Employer") and the

International Union, United Mine Workers of America (hereinafter called "Union"), on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties. This agreement carries forward and preserves the terms and conditions of all the various district agreements executed between the United Mine Workers of America and the various operators and coal associations subject to the terms and conditions of this agreement and as amended, modified and supplemented by this agreement as herein set out.

WITNESSETH: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties, as defined and set forth in this agreement. It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the employees of the parties of the first part. It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law, except in those exempted classifications of employment as hereinafter provided in this agreement. This provision does not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood. It is the intent and purpose of the parties hereto that this agreement will promote and improve industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this agreement.

Article II—SCOPE AND COVERAGE

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Article III—HEALTH AND SAFETY

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Article IV—WAGES AND HOURS

* * *

Article V—SHIFTS AND SHIFT DIFFERENTIALS

* * *

Article VI—STARTING TIME

* * *

Article VII—ALLOWANCES

* * *

Article VIII—HOLIDAYS

* * *

Article IX—REGULAR VACATION

* * *

Article X—GRADUATED VACATION

* * *

Article XI—CHECKOFF

* * *

Article XII—MANPOWER TRAINING

* * *

Article XIII—SENIORITY

* * *

Article XIV—TONNAGE RATES AND HAND LOADING

* * *

Article XV—WELFARE AND RETIREMENT FUND

* * *

Article XVI—MISCELLANEOUS

* * *

Article XVII—SETTLEMENT OF DISPUTES

Section (a) **Mine Committee**

A committee of three employees shall be elected at each mine by the employees at such mine. Each member of the mine committee shall be an employee of the mine at which he is a committee member, and shall be eligible to serve as a committee member only so long as he continues to be an employee of said mine. The duties of the mine committee shall be confined to the adjustment of disputes arising out of this agreement that the mine management and the employee or employees have failed to adjust. The mine committee shall have no other authority or exercise any other control, nor in any way interfere with the operation of the mine; for violation of this section any and all members of the committee may be removed from the committee. (1941)

Section (b) **Grievance Procedure**

Should differences arise between the Mine Workers and the Employer as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time. (The parties will not be represented by legal counsel at any of the steps below.):

(1) By the aggrieved party and his foreman who shall have authority to settle the complaint. Any grievance which is not filed by the aggrieved party within fifteen calendar days after he reasonably should have known of such grievance shall be considered invalid and not subject to further prosecution under the grievance machinery.

(2) If no agreement is reached, the grievance shall be taken up by the mine committee and the mine management within five calendar days of the conclusion of step 1. A standard grievance form shall be completed and jointly signed by the parties to the grievance. Such a form will be agreed upon by the parties.

(3) If no agreement is reached, the grievance shall be taken up by the UMW district representative and a designated representative of the Employer within ten calendar days of the conclusion of step 2.

(4) If no agreement is reached the grievance shall be taken up by the Board within ten calendar days of the conclusion of step 3 or in discharge cases within five calendar days of notice of appeal. The Board shall consist of four members, two of whom shall be designated by the Union and two by the Employer. Neither the Union's representatives on the Board nor the Employer's representatives on the Board shall be the same persons who participated in steps 1, 2, or 3 of this procedure.

(5) Should the Board fail to agree the matter shall, within ten calendar days after decision by the Board, be referred to an umpire who shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and fees incident to the services of an umpire shall be paid equally by the Employer or Employers affected and by the Union.

The grievant shall have the right to be present at each step, if he so desires, of the foregoing procedures until such time as all evidence is taken. A decision reached at any stage prior to step 5 of the proceedings above outlined shall be reduced to writing and signed by both parties. The decision shall be binding on both parties and shall not be subject to reopening except by mutual agreement.

Section (c) **Joint Committee on Arbitration Procedure**

A committee of equal representation from the Employers and the Union will be appointed immediately after the execution of this agreement to study the feasibility of a permanent or chief umpire and/or panel of umpires to arbitrate disputes which may arise under the terms of the agreement.

The committee will examine methods of selection, tenure, compensation and related matters and will complete its report and recommendations no later than April 1, 1972.

Article XVIII—DISCHARGE PROCEDURE

Notwithstanding any other provisions of the National Bituminous Coal Wage Agreement of 1971 the following expedited procedure for the handling of discharge cases is adopted on an experimental basis. This procedure shall remain in effect until November 12, 1972 and shall continue for the term of this agreement unless terminated by thirty-day notice from either party.

No employee shall be summarily discharged.

Where management concludes that the conduct of an employee justifies discharge, he shall be given written notice stating the reason, with a copy to be furnished to the mine committee. He may be relieved from his duties for a period of not more than five calendar days.

Within such five calendar days, the employee may request, and shall be granted, a hearing before the mine superintendent or his designated representative. The employee and the mine committee shall be notified of the time and place of such hearing at which the facts concerning the violation shall be presented. The employee shall be present at the hearing along with the

mine committee and the district representative. After such hearing or if no hearing was requested, mine management shall immediately at the conclusion of such five calendar days notify the employee, the mine committee and the district representative in writing of its decision.

Should the employee believe that mine management's decision is without just cause, the grievance shall be referred directly to step four of the grievance machinery within five calendar days of receipt of such decision and it shall be disposed of in accordance with those procedures of the agreement.

In any case in which management has discharged an employee, it shall be the duty of the company to go forward with its evidence in the hearing and the grievant and the Union will then present the case for the grievant.

In all discharge cases should it be decided by the umpire that an injustice has been dealt the grievant, the company shall be ordered to reinstate such grievant and pay him such wages as he would have earned had he not been initially relieved from his duties and then discharged.

The decision of the umpire shall be final and shall not be subject to reopening except by mutual agreement. Expenses and fees incident to the arbitration shall be borne equally by both parties.

Cases where an employee is relieved of his duties but is not discharged shall be processed under the regular grievance procedure entitled "Settlement of Disputes."

If this provision is not extended, disputes which would have been handled under this provision will be handled under the following provision from the National Bituminous Coal Wage Agreement of 1968 which is incorporated herein for this purpose:

"Discharge Cases

When a mine worker has been discharged from his employment and he believes he has been unjustly dealt with, it shall be a case under the 'Settlement of Local and District Disputes' clause. In all discharge cases should it be decided under the rules of this agreement that an injustice has been dealt the mine worker, the operator shall reinstate and compensate him at the rate based on the earning of said mine worker prior to such discharge. Provided, however, that such case shall be taken up within five days from the date of discharge."

Article XIX—DISTRICT AGREEMENTS

* * *

Section (b) **Prior Practice and Custom**

This agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference; and all local agreements, rules, regulations and customs heretofore established in conflict with this agreement are hereby abolished. Prior practice and custom not in conflict with this agreement may be continued, but any provisions in district or local agreements providing for the levying, assessing or collecting of fines or providing for "no strike," "indemnity" or "guarantee" clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this agreement. Wherever a conflict arises between this agreement and any district or local agreement, this agreement shall prevail.

Article XX—MAINTAIN INTEGRITY OF CONTRACT

The United Mine Workers of America and the Employers agree and affirm that they will maintain the integrity of this contract and that all disputes and claims

which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Disputes" article of this agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract and by collective bargaining without recourse to courts.

Article XXI—NATIONAL CONFERENCES

* * *

Article XXII—SEVERABILITY CLAUSE

* * *

Article XXIII—TERMINATION OF AGREEMENT

* * *

Plaintiff's Exhibit No. 91

UNITED MINE WORKERS OF AMERICA

United Mine Workers Building

Washington, D. C. 20005

September 23, 1966

To all Members of the
United Mine Workers of America

Greetings:

This is to officially advise you that at its recent meeting the International Executive Board reviewed the numerous *unauthorized* work stoppages in the coal industry which have been contrary to the policy enunciated by the International Executive Board.

In order to protect the best interests of the entire membership and to prevent unnecessary loss of wages

to the members and royalties to the United Mine Workers of America Welfare and Retirement Fund, the International Executive Board unanimously adopted the following resolution:

"RESOLUTION"

"WHEREAS, local work stoppages involving a mine in whole or in part not officially authorized by the United Mine Workers of America were prohibited by the order of the International Executive Board on October 24, 1951. The Board reaffirmed its earlier order on May 17, 1956, and instructed local unions who fail to utilize the grievance machinery of the joint wage agreement to settle disputes arising thereunder but resort to work stoppages that they would be subject to discipline by the International Executive Board.

"WHEREAS, the Board on May 17, 1956, further determined that local union officers giving aid and comfort to such unauthorized work stoppages as well as individual members guilty of promoting, conducting, or prolonging such unauthorized stoppages would be subject to disciplinary action by the International Executive Board.

"WHEREAS, certain members of the United Mine Workers of America have failed to respect the provisions of the joint industry wage agreement, the international constitution and the declared policy of the union of honoring wage agreements to which it is a party.

"WHEREAS, such willful and ill-advised action on the part of local unions and individual members imperils the welfare of all the members of the union and threatens the integrity of the joint contractual relationship in the coal industry.

"THEREFORE BE IT RESOLVED that the International Executive Board reaffirms its action of October 24, 1951, and May 17, 1956, and implements its officers regarding disciplinary action against individual members. Hereafter when it has proven that any member or members were engaged in promoting, conducting or prolonging an unauthorized work stoppage, such member shall be penalized the sum of five dollars for each day of such unauthorized stoppage. Such penalty shall be in addition to any penalty imposed upon the local unions involved.

"By the action of the International Executive Board this 9th day of September, 1966."

John T. Kmetz	Fred K. Hefferly
John Ghizzoni	R. R. Humphreys
Ewing Watt	William Ure
John P. Cassidy	James W. Ridings
Joseph Yablonski	William Mitch
Pete Phillippi	David Fowler
Mart F. Brennan	Arthur Biggs
Wilbert Killion	John H. Delaney
Joseph T. Kershetsky	R. J. Boyle
Sam Nicholls	Carson Hibbitts
Louis Austin	C. E. Beane
Joe Shannon	C. J. Urbaniak
Henry Allai	

In Behalf of the International Executive Board

W. A. BOYLE
President

GEO. J. TILLER
Vice President

JOHN OWENS
Secretary-Treasurer

Plaintiff's Exhibit No. 92

UNITED MINE WORKERS OF AMERICA

United Mine Workers' Building

Washington, D. C. 20005

October 24, 1951

To All Members, Committeemen and
Officers of All Local Unions
United Mine Workers of America

Dear Sirs and Brothers:

During the past year a wave of unauthorized local strikes or work stoppages occurred in various Districts. In nearly all of these strikes or stoppages the machinery incorporated in joint agreements for the consideration and disposition of grievances was not invoked. The International Executive Board, now in session in Washington, D. C., has given consideration to the implications involved in these strikes or stoppages and reached the following conclusions thereon:

1. These unauthorized strikes adversely affect the contractual relationships between the United Mine Workers of America and the coal operators.

2. Unauthorized strikes cause unnecessary loss of earnings to our members, work hardship upon their families and are not beneficial to the interests of the communities wherein they occur.

3. Unauthorized strikes reflect discredit upon our organization's sixty-year record of honoring contractual provisions and result in strained labor relations between the parties signatory to the joint agreements.

4. In some instances these unauthorized work stoppages have created situations wherein union operations have not been able to meet their commitments and this resulted in these operations losing business to competitors.

5. The joint agreements between our organization and the coal operators contain established machinery for the adjustment of disputes between the parties signatory thereto which eliminate the necessity for calling strikes.

6. These unauthorized strikes not only endanger the stability of the coal industry, but encourage the operators to demand punitive clauses in wage agreements.

On the basis of the foregoing conclusions, the International Executive Board, by unanimous vote, urges all members, local union officers and committeemen, district and international officials to not only refrain from participation in these unauthorized strikes, but to use their efforts and influence to prevent occurrence of said unauthorized strikes in contravention of the International Constitution and in direct opposition to the established policies of the United Mine Workers of America.

We express the hope that the policies outlined herein will be followed in the best interests of our organization and our membership.

On behalf of the International Executive Board, United Mine Workers of America.

JOHN L. LEWIS
President

THOMAS KENNEDY
Vice President

JOHN OWENS
Secretary-Treasurer

Plaintiff's Exhibit No. 94

UNITED MINE WORKERS OF AMERICA

United Mine Workers' Building

Washington, D. C. 20005

May 17, 1956

To the Officers and Members of
the United Mine Workers of America:

DECLARATION OF POLICY

Local work stoppages involving a mine, in whole or in part, not officially authorized by the United Mine Workers of America, were prohibited by order of the International Executive Board, dated October 24, 1951.

Certain local unions have seen fit to ignore that policy and wrongfully authorize and participate in such unwarranted stoppages. In doing so, these local unions and the membership thereof are defiant of their Union and imperil the welfare of all other members.

The International Executive Board, endowed with authority to take such action, reaffirms its previous declaration, dated October 24, 1951, and again instructs compliance therewith.

The Executive Board further advises as follows:

1. Local unions will utilize the machinery of the Joint Wage Agreement for the settlement of all disputes arising thereunder.

2. Local unions failing to do so, and resorting to local stoppages, will be subject to discipline and penalties will be imposed by the International Executive Board.

3. Local unions engaged in unwarranted local stoppages, and picketing other mines not engaged in the dispute, will suffer double penalties.

4. Local union officers giving aid and comfort to such unwarranted stoppages, or who are guilty of negligence in their failure to prevent them, will be subject to disciplinary action by the International Executive Board, at its option. Individual members of the local union, guilty of reprehensible conduct in promoting, conducting or prolonging such unwarranted stoppages, will in like fashion be subject to disciplinary action and penalties imposed by the International Executive Board.

5. Sundry local unions, recently guilty of ignoring the machinery of the Joint Wage Agreement, have been disciplined and penalties imposed. Repetition of their offenses will bring further, more severe penalties.

The International Executive Board calls upon all loyal members to give active support to the sound policy of honoring the provisions of the Joint Industry Wage Agreement and the laws of this Union. Local unions and individual members moving in defiance and imperiling the welfare of all the members of this Union must be prepared to accept responsibility for their action and the penalties which will be inevitable.

Done this 17th day of May, 1956 by the International Executive Board, United Mine Workers of America, Washington, D. C.

ATTEST:

JOHN OWENS
Secretary-Treasurer

Portions of Plaintiff's Exhibit No. 34—
UMWA Constitution

ARTICLE II.

Objects.

* * *

Second. To increase the wages, and improve the conditions of employment of our members by legislation, conciliation, joint agreements or strikes.

* * *

ARTICLE III.

Jurisdiction.

Section 1. The International Union shall be composed of workers eligible for membership in the United Mine Workers of America, and may be divided into Districts, Sub-Districts and Local Unions. The International Union shall have supreme legislative, executive and judicial authority over all members and subordinate branches, and shall be the ultimate tribunal to which all matters of importance to the welfare of the membership and subordinate branches shall be referred for adjustment. Between International Conventions the supreme executive and judicial powers of the International Union shall be vested in its Executive officers and Executive Board in accordance with and subject to the provisions of this Constitution.

Sec. 2. All Districts, Sub-Districts and Local Unions must be chartered by, and shall be under the jurisdiction of and subject to the laws of the International Union and rulings of the International Executive Board. Charters of Districts, Sub-Districts and Local Unions may be revoked by the International President, who shall have authority to create a provisional government for the

subordinate branch whose charter has been revoked. This action of the International President shall be subject to review by the International Executive Board upon appeal by any officers deposed or any members affected thereby. Until such review is had and unless said order of revocation is set aside, all members, officers and branches within the territory affected by the order of revocation shall respect and conform to said order. An appeal may be had from the decision of the Executive Board upon such order of revocation, to the next International Convention.

* * *

ARTICLE VI.

Local Unions.

* * *

Sec. 3. If in the judgment of the officers of the International, District or Sub-District Unions, any Local Union has taken any action opposed to the interests of the United Mine Workers, the International Union or the District or Sub-District Unions having jurisdiction over the Local Union shall have the right to reverse the action of the Local Union.

* * *

ARTICLE XVI.

Strikes.

Section 1. No District shall be permitted to engage in a strike involving all or a major portion of its members without the sanction of an International Convention or the International Executive Board.

Sec. 2. Strikes shall not be called in any unorganized field without the sanction of an International Convention

or the International Executive Board and no financial aid shall be furnished by the International Union for the support of any strike until after the strike has been in effect four weeks, unless otherwise decided by the International Executive Board.

* * *

ARTICLE XX.

Miscellaneous.

* * *

Sec. 9. Any member or members engaged in an unauthorized work stoppage resulting in shutting down a mine shall, after due notice and hearing, upon conviction suffer such penalty as may be imposed upon them by the respective District Organization.

Portions of the Court's Charge

1456 There are three classes of defendants in this case. There is the International Union—that's called the Mine Workers of America. The District—that is District 17—of the United Mine Workers of America. That's two. Then the three individual local unions, that is Local 6572, Local 7626 and Local 2236.

* * *

1457 The rules of liability, if any, are different for the locals and the other two defendants, the District Union and the International Union. Considering the locals first, they would be responsible for a given work stoppage or strike because of the mass action of their members in participating in a strike or work stoppage over a dispute which should have been settled under the grievance and arbitration provisions contained in the two coal wage agreements referred to previously. The mass action of the members in such cases must realistically be regarded as action of the given local union.

Mass action occurs when all or a great majority of all of the members of a given local union engage in an otherwise unlawful, unexcused or unjustified work stoppage.

The standard of responsibility of the International Union and the District 17 Union is different from that of the locals. Basically, the International Union and the District Union would be responsible for a given work stoppage or strike in either of two instances.

1458 First the International Union and District 17 Union each had a duty and responsibility under the applicable coal wage contracts to use all reasonable means available to them or each of them if they had reason to believe that work stoppage or strike would occur to prevent the same from occurring in violation of the contracts and upon notice of such strikes occuring, to terminate such unlawful strikes once begun. If you find from a preponderance of the evidence that the International and District Unions did not use all of the reasonable means available to them to prevent work stoppages or strikes from occurring in violation of the contract, or to terminate any such work stoppages or strikes after they began, then the Court instructs you that the International or District Unions could be liable for each work stoppage or strike.

Second, if the work stoppage or strike was engaged in by the locals while they were acting as agents for District 17 and/or the International either within the scope of their authority, then the International or District 17 or both of them could be liable for such work stoppage or strike.

Unincorporated associations, such as the defendant International and District Unions, are in law persons but of course, cannot act otherwise than through officers or

employees or other agents. The law, therefore,
1459 holds unincorporated associations, such as defendant International and District Unions responsible for all the acts of their respective officers, or employees or other agents provided such acts were done within the scope of their authority.

Authority to act for a labor union in a particular matter or in some particular way or manner may be inferred from the surrounding facts and circumstances shown by the evidence in the case. That is to say, authority to act for a labor union or to engage in a particular conduct for it, like any other factor at issue in a civil case need not be established by direct evidence but may be established by indirect or circumstantial evidence. And every act of every officer or employee or other agent on behalf of, or in the name of a labor union if done within the scope of his authority is in law the act of the union itself.

The plaintiff contends that the defendants, International Union and District 17 through their contract and constitution made the local unions their agents for purposes of settling arbitrable disputes. The plaintiff introduced evidence that the International left all and the District part of the handling of disputes which is part of the business of the union to the locals. If you believe from a preponderance of the evidence that the local union or unions was or were acting as agents within the scope of their authority for the International Union
1460 and/or District 17 or both by engaging in a given work stoppage or strike, then you may find the International and/or District 17 responsible for it.

However, a union is not responsible for the acts of an agent which are performed directly contrary to orders or directions given the agent unless the union knows the

agent is or has been performing those acts and does not reasonably act to prevent the agent from performing them. If you believe from a preponderance of the evidence that the locals were agents of the District and International, while engaging in a work stoppage or strike and that the locals were ordered not to engage in the work stoppage or strike, but that the International and District knew such work stoppages or strikes would occur and were occurring, had the authority to stop and prevent them, but did not do so, you may find the International and District responsible for those work stoppages or strikes.

* * *

1475 I want to explain that to you, so that there can be no misunderstanding. This is a very difficult verdict form to prepare to get a full understanding of what the jury means. In any case, if you should
1476 find a verdict against the International or the District, it cannot exceed the amount you find against the local. I think that part ought to be clear. Any amount —if you do find against the International or District for any amount, either the same or a lesser amount, it is not in addition to the other, but as a part of it—overlaps, so to speak, where it would be joint. For example, if you should find ten thousand dollars against one of the locals, ten thousand dollars against the International, and ten thousand dollars against the District, it would all be the same ten thousand dollars stacked one on top of the other. If you should find, in that example, ten thousand dollars against the local, five thousand dollars against the District, and five thousand dollars against the International, the five thousand of the two—International and District—would be as a part of the ten. It's not in addition to it. It wouldn't make a total of twenty thousand. The overall would be only ten. Then the local and International

would be responsible under the verdict for only five of that ten. Understand that.

And I want to make—I have tried to instruct on this and perhaps—I'm not sure I got it clear. I want to make this part real clear as to the liability of the International Union and the District Union. If you find, as the plaintiff has contended, that the International and District
1477 should have anticipated the strikes, by reason of the great numbers of them, and knew that they were coming, then it is their contention that they had a duty to do something to not let them strike at all, in which event they would expect your verdict to be as much as—the same as the locals.

In the event you don't agree with that, then the next area would be that the plaintiff contends that you would be obligated to find against the International and local from such time as they had an opportunity to learn of the strike and to act, and to act responsively, to take all reasonable steps available to stop the walkout or strike.

The third area, the defendants contend, of course, that, in the first place, the International and District had no obligation in advance; second, that they acted as quickly as they possibly could; and third, that they took every reasonable available step to end the strike and therefore, there would be no responsibility as to them.

So you could have in your verdict forms then, you could have a verdict against the local for whatever amount you think they are responsible for under the evidence in the case. You could have the same or a lower amount or nothing against the International and District, as you find the evidence is. In the numbers of cases where there was a defense, of course, you could find against the plaintiff as to those locals even.

Defendant's Rejected Instruction on "Union Responsibility"

NOTE: This instruction was refused at Transcript, p 1481

UNION RESPONSIBILITY

1500 (1) A union is not liable for "irresponsible—acts by individual workers—" "Unions may only
1501 be held responsible for the authorized or ratified actions of their officers and agents—"The fact that the strike took place is not sufficient in itself to raise the presumption that the union, as an entity separate from its members, is responsible—A union is not responsible for an unauthorized strike which the union officials are endeavoring to stop."

(2) Each of the five labor organization defendants Local Union 2236, Local Union 6572, Local Union 7626, District 17 and International Union, is a separate and distinct legal entity and each is not responsible for the actions of any or all of the other organizations unless it authorizes, instigates or encourages the actions of the others and is liable only for the acts of the others it has in fact so authorized or instigated. "A local union is a legal entity apart from its District and International —"

(3) Each of the three local union defendants would only be liable for a work stoppage or strike if it acting through its officers or agents approved, authorized, adopted, encouraged or prolonged the continuance of the work stoppage.

(4) The defendant District 17, United Mine Workers of America, would be liable for a work stoppage only if it acting through its officers or agents approved, authorized, adopted, encouraged or prolonged the continuance of the work stoppage.

1502 (5) Defendant District 17, United Mine Workers of America "would not be liable for the actions of the officers or individual members of the local unions unless it is shown that District 17, United Mine Workers of America authorized, participated in, or ratified the acts of the local union or individual member after express knowledge of such acts, which are claimed to be violations of the contract." "Where a union did not call, authorize or encourage a strike, and, on the contrary, employed its authority to oppose it, no liability for an unauthorized or wildcat strike could be attributed to the union."

(6) Defendant International Union, United Mine Workers of America "would not be liable for the actions of the officers or individual members of the local unions unless it is shown that the International Union, United Mine Workers of America authorized, participated in, or ratified the acts of the local union or individual member after express knowledge of such acts, which are claimed to be violations of the contract." "Where a union did not call, authorize or encourage a strike, and, on the contrary, employed its authority to oppose it, no liability for an unauthorized or wildcat strike could be attributed to the union."

(7) Even if a work stoppage is approved by a local union, neither by District 17, United Mine Workers of America nor the International Union, United Mine
1503 Workers of America is "liable for 'wild cat' strikes and is not required to — take any action with regard to them — The question is not whether the International Union, United Mine Workers of America did everything it might have done, but whether it adopted, encouraged or prolonged the continuance of the strike.

Sample Verdict—As to Strike No. 41

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

CARBON FUEL COMPANY, a corporation, *Plaintiff*

v. Civil Action No.

UNITED MINE WORKERS OF AMERICA; DISTRICT NO. 17, United Mine Workers of America; LOCAL UNION NO. 6572, United Mine Workers of America; LOCAL UNION NO. 7626, United Mine Workers of America; and LOCAL UNION NO. 2236, United Mine Workers of America, *Defendants* 74-152-CH

We, the Jury, find as to work stoppage no. 41

1. _____ (for or against) LOCAL UNION NO. 6572, United Mine Workers of America, and assess the damages at $_____;

2. _____ (for or against) LOCAL UNION NO. 7626, United Mine Workers of America, and assess the damages at $_____;

3. AGAINST (for or against) LOCAL UNION NO. 2236, United Mine Workers of America, and assess the damages at $19,976.00;

If you made a finding against one or more of the above Local Union defendants, then, and only then, may

you make a finding against either or both of the defendants below.

4. AGAINST (for or against) the UNITED MINE WORKERS OF AMERICA, and assess the damages at $6,658.00;

5. AGAINST (for or against) DISTRICT NO. 17, United Mine Workers of America, and assess the damages at $6,658.00.

Note: The verdict against the International and/or the District may be the same in amount or less than that found against the Local or Locals and shall be considered as a joint verdict with the verdict or verdicts against such Local or Locals.

April 1, 1976. (Date)

ARLIE F. LYNCH (Foreman)

Sample Judgment—As to Strike No. 41

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action File No. 74-152 CH

JUDGMENT

As to Work Stoppage No. 41

CARBON FUEL COMPANY, a corporation,
Plaintiff

vs

UNITED MINE WORKERS OF AMERICA; DISTRICT NO. 17, United Mine Workers of America; LOCAL UNION NO. 6572, United Mine Workers of America; LOCAL UNION NO. 7626, United Mine Workers of America; and LOCAL UNION NO. 2236, United Mine Workers of America,
Defendants

This action came on for trial before the Court and a jury, Honorable K. K. Hall, United States District Judge, presiding, and the issues have been duly tried and the jury duly rendered its verdict,

It is Ordered and Adjudged that as to work stoppage number 41 the plaintiff, Carbon Fuel Company, a corporation, recover of the defendant, Local Union No. 2236, United Mine Workers of America, the sum of $19,976.00; recover of the defendant, the United Mine Workers of America, the sum of $6,658.00; and recover of the defendant, District No. 17, United Mine Workers of America, the sum of $6,658.00; all with interest thereon

at the rate of six percent (6%) as provided by law, and its costs of action; said liability of the United Mine Workers of America and of District No. 17; United Mine Workers of America, being joint with that of Local Union No. 2236, United Mine Workers of America but only as to the amount or amounts above specified.

Dated at Charleston, West Virginia, this 1st day of April, 1976.

/s/ JAMES A. McWHORTER
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE

FOURTH CIRCUIT

NO. 77-1422

CARBON FUEL COMPANY,
Appellee,

versus

UNITED MINE WORKERS OF AMERICA:
DISTRICT NO. 17, United Mine
Workers of America;
LOCAL UNION NO. 6572, United
Mine Workers of America;
LOCAL UNION NO. 7626, United
Mine Workers of America;
LOCAL UNION NO. 2236, United
Mine Workers of America;
Appellants.

Appeal from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and vacated in part. The case is remanded in part to the United States District Court for the Southern District of West Virginia with instructions consistent with the opinion of this Court filed herewith.

FILED Sept. 21, 1978

U. S. Court of Appeals
Fourth Circuit

/s/ WILLIAM K. SLATE, II
Clerk

Supreme Court, U. S.
FILED
MAR 3 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1183

CARBON FUEL COMPANY,

Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236, UNITED MINE WORKERS OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1183

CARBON FUEL COMPANY,

Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236, UNITED MINE WORKERS OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For the Fourth Circuit

RESTATEMENT OF QUESTION PRESENTED

Can parent labor unions be responsible for unauthorized "wildcat" strikes when the uncontroverted evidence shows that the parent unions did not start or participate in the stoppage and took steps to end them?

COUNTERSTATEMENT OF THE CASE

The Respondents (the unions) accept the Statement of the Case by the Petitioner coal company with minor corrections.[1] In addition to Petitioner's statement that "none of the strikes was *formally* called or authorized by the unions", it must be noted that the record does not contain any evidence of informal or indirect authorization or ratification. As is stated at Pet. 3, the unions had a policy against striking.

The uncontradicted evidence introduced by the unions at trial showed that upon the occurrence of a stoppage, the union representative from respondent District 17 would attend the local meeting and urge the men to return to work and would continue his efforts until a return to work was achieved. The district representatives contacted the local union officials to evaluate the situation, attended the local union meeting, limited the discussion to the unauthorized stoppage and continued his efforts until the stoppage was over. Those efforts to end stoppages were the "highest priority" of the District.

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[1]District 17, UMWA and the local unions of UMWA were not, at least after the onset of district and local union autonomy, as is stated at Pet. 2 and 3, "administrative sub-divisions" of the International. For a detailed explanation of the three-tier structure of the UMWA and the functional autonomy which exists between the tiers, see cases cited at footnote 2. Respondents believe there was just as much, or more, evidence that the efforts made by the union were not "futile", contrary to the assertion at Pet. 3. The statement that the grievance and arbitration machinery encompasses "all imaginable disputes" and the further assertion, also at Pet. 3, that disputes outside the employer/employee relationship involved "a dispute over the extent of the no-strike obligation under the contract" is argumentative and was in effect overruled by the Court of Appeals, see A-2 — A-5, 582 F.2d at 1348-9. The issues raised therein are not addressed further inasmuch as they are not raised by the petition.

Restatement of Question Presented—The parties sharply disputed what would have happened if the unions had taken action to discipline the membership and to suspend or revoke local union charters upon the occurrence of unauthorized stoppages. The unions' testimony tended to prove that such steps would be counterproductive.

Even though the court below did state that the unions would not be responsible if they "did nothing", the uncontradicted record demonstrates that the unions consistently took steps to end stoppages. The narrow question on the record and Petition before the Court is, therefore, whether the unions were contractually obligated to take steps beyond those already taken — which the unions regarded as drastic and counterproductive — to end stoppages the unions neither started nor encouraged.

REASONS FOR DENYING THE WRIT

Respondents will answer the arguments made in the petition in reverse order.

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1. THE RULING BELOW IS ENTIRELY CONSISTENT WITH SUBSTANTIVE FEDERAL LABOR POLICY WELL ESTABLISHED BY THIS COURT, THE COURTS OF APPEALS AND THE NATIONAL LABOR RELATIONS BOARD.

The ruling of the Court of Appeals, that parent unions are not responsible for strikes which they neither authorize nor ratify, has deep and historic roots in federal labor law and policy. In *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1921), this Court held that the UMWA International Union was not legally responsible for the illegal acts of affiliates, UMWA districts and locals. Speaking for the majority, Mr. Chief Justice Taft stated:

> "The argument of counsel for the plaintiffs is that, because the national body had authority to discipline district organizations, to make local strikes its own, and to pay their cost, if it deemed it wise, the duty was thrust on it, when it knew a local strike was on, to superintend it and prevent its becoming lawless at its peril. We do not conceive that such a responsibility is imposed on the national body.

259 U.S. at 395. The then-Chief Justice continued:

> "But it is said that the district was doing the work of the International and carrying out its policies, and this circumstance makes the former an agent. We cannot agree to this in the face of the specific stipulation between them that in such a case, unless the International expressly assumed responsibility, the district must meet it alone."

259 U.S. at 395.

The 1955 decision of the Fourth Circuit in *United Construction Workers v. Haislip Baking Company*, 223 F.2d 874 cert. denied 350 U.S. 847, which was restated verbatim by the Court below (A-9 and 10, 582 F.2d at 1351), and the 1958 decision of the Sixth Circuit in *Lewis v. Benedict Coal Corp.*, 259 F.2d 346, 351, aff'd evenly divided Court, 361 U.S. 459 (1958), hold that — even when a parent union negotiated the contract in question[2] — it, in the words of then Judge, and now Mr. Justice Stewart:

---

[2]The three-tier structure of the UMWA was described in some detail at *Hodgson v. UMWA*, 344 F.Supp. 17, 20, 29 and 344 F.Supp. 990, 993-94, 997-98 (D.D.C. 1972).

> remained free from liability for spontaneous or "wildcat" strikes. . . .
>
> * * *
>
> . . . The real issue is whether the district's agent did induce the strikes in question.

259 F.2d at 351. *Benedict* and *Haislip* form the core of the rulings of the Fourth and Sixth Circuits as well as the Fifth and Seventh Circuits, that the parent UMWA union is not responsible for work stoppages which it neither authorizes nor ratifies. *United States Steel Corporation v. UMWA*, 519 F.2d 1249 (5th Cir. 1975); *Southern Ohio Coal Company v. UMWA*, 551 F.2d 695 (6th Cir. 1977), cert. denied 434 U.S. 876 (1977); *Old Ben Coal Corp. v. Local 1487, UMWA*, 457 F.2d 162, 164-5 (7th Cir. 1972).[3] Hereinafter that body of law, which was specifically de-

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[3]The unions neither understand nor agree with the company's position, stated at Pet. 7, n. 2, that the holdings of the Fifth and Seventh Circuits, are not clear. The *Old Ben* decision of the Seventh Circuit simply notes that even though a strike might be in breach of the implied no strike duty, the union would not be responsible unless the strike was also authorized or ratified. That is, the union would not be responsible for "spontaneous or 'wildcat' strikes" even if they were over matters "subject to the settlement procedures of the grievance". 457 F.2d at 175. *Old Ben* draws heavily on the *Benedict* decision and leaves no doubt that it applies and follows the *Benedict-Haislip* rule.

The decision of the Fifth Circuit in *U. S. Steel* follows and adopts the *Benedict-Haislip* rule, but adds an evidentiary ruling that a pattern of practice might prove informal authorization or ratification. The following portions of the Fifth Circuit's opinion make it clear that the Fifth Circuit followed the *Benedict-Haislip* rule: (1) language that the union must make "itself a party to the strike" to be responsible, 519 F. 2d at 1251-2; (2) the rejection of specific affirmative action requirements, 519 F.2d at 1255-6; (3) the holding that the fact of a strike does not raise a presumption of union responsibility, 519 F.2d at 1253; and (4) the lengthy discussion of the requirements for proof of authorization or ratification and the remand for further consideration of that point. 519 F.2d at 1253-56.

cided in matters involving the national UMWA agreements and wildcat strikes in the coal industry, will be referred to as the *Benedict-Haislip* rule.

The repeated use of the word "agent" by this Court in *Coronado,* supra, at p. 4, and the requirement of the application of the ordinary rules of agency in *UMWA v. Gibbs,* 383 U.S. 715, 736 (1966), leave no doubt that the *Benedict-Haislip* requirement, that one of the two bases of liability under the law of agency — authority or ratification — must be present if the parent union to be held responsible, is completely in step with the rulings of this Court. The National Labor Relations Board has followed and applied the same rule. *Franklin Electric Construction Cooperative,* 121 NLRB 143, 145-46, 42 LRRM 1301, 1303 (1958). Finally, the principal commentator on the scope and meaning of Section 301 of Taft-Hartley, 29 U.S.C. 185, Professor Archibald Cox, has written:

> It is clear that [Section 301 does] not impose on labor unions a responsibility beyond that imposed by normal rules of agency. . . . Consequently, just as a corporation is not liable for the acts of a stockholder, so recognition of a labor organization as a juristic personality prevents imposing liability for the acts of its members.
>
> * * *
>
> . . . in dealing with local affairs, including local strikes and boycotts, a local union ordinarily acts as separate entity in pursuit of its own affairs.

Cox, *Some Aspects of the Labor Management Relations Act, 1947,* 61 Harv. L. Rev. 274, 308, 310, 312 (1948).

When weighed against the strength of the *Benedict-Haislip* rule, Petitioner's argument that the "decision below

conflicts with principles enunciated by this Court" must fail.

A narrow problem with the employer's argument at Pet. 12-13 is that it begs the issue now in controversy — whether there is a breach of contract or not, i.e. whether the unions did "break agreements". The ruling below that the District and International Union did not break any agreements is based on the *Benedict-Haislip* rule and is, therefore, entirely consistent with principles enunciated by this Court.

Petitioner also suggests that the federal labor policy of uninterrupted operation during the term of the agreement is at stake. Aside from the fact that there was no express agreement as to uninterrupted operation, the further problem with Petitioner's argument is that it mentions only one facet of the federal labor policy and it ignores other well-established federal labor policies including those favoring the establishment and continued existence of labor unions. As the Sixth Circuit recognized in one of its more recent cases applying the *Benedict-Haislip* rule, *North American Coal Corporation v. Local 2262, UMWA,* 497 F.2d 459, 466 (6th Cir. 1974), departures from the ordinary rules of agency of *Benedict-Haislip* could mean the destruction of labor unions.

> It has been clear to Congress for many years that imposition upon unions of vicarious liability or the unauthorized acts of individuals could easily mean elimination of labor unions as a social institution in America. . . .
>
> Irresponsible or violent acts by individual workers (or by agent provocateur) if automatically attributable to the union on the scene could, of course, serve to destroy it.

2. THE CASE BELOW WAS DECIDED ON THE BASIS OF WELL-ESTABLISHED CIRCUIT AUTHORITY AND DOES NOT REQUIRE REVIEW OR ENUNCIATION BY THIS COURT.

Petitioner's second argument, that there is an important and recurring question of federal law which has not been, but should be, decided by this Court, ignores the breadth of support for the *Benedict-Haislip* rule by four Courts of Appeals and focuses on the evolving and immature law of the Third Circuit.

The question dealt with by the Fourth Circuit, and for which certiorari is sought, involves claims for strikes which have already happened and which have been litigated to final judgment. The authority cited prominently by Respondent, *Bituminous Coal Operators Association v. UMWA*, 585 F.2d 586 (3rd Cir. 1978), by and large[4] deals with anticipated stoppages which have not yet occurred. It involves coal operators with operations in more than one circuit, unlike the single operator petitioner's operations in a single state and circuit, and, most importantly, deals with the outer limits of *prospective* relief in multi-employer settings.

Although the case before this Court has been fully litigated, as is pointed out at Pet. 8, it is equally true that the *Bituminous Coal Operators* case is anything but completely litigated. It is on remand, the Third Circuit having reversed *dismissal* of motions for injunctive relief, for record development of unknown dimensions. 585 F.2d at 597, 599. While *Bituminous Coal Operators* is suggestive of a deviation from the *Benedict-Haislip* rule, the immaturity and lack of definition of the intra-circuit authorities, discussed herein, undermines Petitioner's argument that the question presented in this case presents an important and recurring question of federal law. Also, the record herein does not provide a sound basis for testing the emerging law of the Third Circuit since the Petition and record herein does not concern prospective relief, multiple employers or multi-state or circuit situations.[5]

[4]Some individual coal companies in the *Bituminous Coal Operators* case did seek damages in addition to prospective relief. 585 F.2d at 597, 599. Those cases appealed a *dismissal* of prayers for injunctive relief and the opinion addresses only the question of injunctive relief. The discussion of the case at Pet. 10 and the authorities cited is limited to the major aspect of the case seeking innovative prospective relief.

3. THE DECISION BELOW IS NOT IN DIRECT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

Petitioners contend that the holding below is in "direct and acknowledged" conflict with two decisions of the Third Circuit and one decision of the Eighth Circuit.

Notwithstanding language that a union is required "to use its best efforts to return striking workers to their jobs," it is clear from both the district court and circuit decisions that liability in *Wagner Electric Co. v. Local 1104 Electrical Workers*, 496 F.2d at 956 (1974), was based on fact findings that the strike was informally authorized or rati-

[5]The citation of *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), at Pet. 9 concerning the need for "uniform law" is inappropriate because *Lucas Flour* discussed whether to apply state or federal law in a state labor case and ruled that federal substantive labor law applied to cases tried in state court. The *Benedict-Haislip* rule is well-accepted, virtually uniform federal law. Critically, *Lucas* cited approvingly both *Benedict* and *Haislip*. 369 U.S. at 105, n. 13.

fied.[6] The Court of Appeals affirmed under Rule 52(a), FRCP, and ruled that union responsibility was based on:

> the circumstances surrounding the union meetings, the involvement of union officials and stewards in initiating the strike

and other factors. 496 F.2d at 956. Accordingly, the Eighth Circuit simply affirmed fact findings of *informal* ratification or authorization consistent with *Benedict-Haislip*.

Although the decision of the Third Circuit in *United States Steel Corporation v. UMWA*, 534 F.2d 1063, 1071-4 (1976) does contain some language concerning affirmative efforts to end strikes, it is distinguishable from the case now before the Court in several regards and does not, therefore, constitute a direct and meaningful conflict among the decisions of the Courts of Appeals.

The dissenting Judge on the panel in that case would apparently apply the rule of *Benedict-Haislip* inasmuch as the contract violations would require evidence that the District or International "ordered, approved or even con-

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[6]The District Court found that the strike began after a special union meeting was called and that union leaders who attended the meeting were seen "beckoning to employees to leave the plant." After that meeting, the employees did begin leaving. Thereafter, a union Executive Board Member told the employees not to cross a picket line at a gate. The district court also stressed: (1) the "rather strong language" denouncing the employer at the union meeting, (2) the timing of the onset of the stoppage shortly after the important first union meeting and (3) the fact that the underlying grievance was a "union" as distinguished from an "individual" grievance. *Id.*, 661 F.Supp. 647, 648-51 (Ed. Mo. 1973). None of the above facts are present in this record.

doned the action of the local". See 534 F.2d at 1084.[7] Although the two concurring Judges on the panel did speak in terms of legally required affirmative efforts to end stoppages, one of the Judges clearly limited his opinion to injunctive relief.

> (T)here is an enormous difference between holding the unions financially liable for the wildcat activities of possibly unruly members, and directing entities to take steps to specifically perform the contract . . . We have no occasion . . . to consider the extent, *if any*, to which the members' actions *may* make the UMW (International), District 5, . . . liable in damages. Preliminary injunctive relief was appropriate on this record even if under *ordinary agency principles* they would not be liable for such damages.

534 F.2d at 1074 (emphasis added) (Gibbons, J).

The concurring Judge apparently limited his discussion to "an injunction proceeding" and did not mention damage liability. 534 F.2d at 1080 (Rosenn, J.). The question of damage relief was not even before the Third Circuit as the case was an appeal from an interlocutory injunction. 534 F.2d at 1066. *Boys Markets, Inc. v. Retail Clerks, Local*

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[7]The failure of the Third Circuit to apply the ordinary rules of agency in *Eazor Express, Inc. v. Teamsters*, 520 F.2d 951 (1975), cert. denied 424 U.S. 935 has been criticized:

> . . . [S]ince Congress subjected the unions to responsibility only in accordance with the common law rules of agency, a duty to use all reasonable efforts to end a wildcat strike should not be imposed unless it is firmly grounded in the contract.

Comment, 89 *Harv.L.Rev.* 601, 609 (1976). See also 605 esp. n. 30 and, 607 text at n. 45 and 609 notes 58 and 59. The same criticism applies to both the Third Circuit decisions, *U. S. Steel* and *Republic*, relied on by Petitioner.

770, 398 U.S. 235, 248 text at n. 17 (1970) suggested that different considerations may govern the damage and injunctive forms of relief in the labor setting. Accordingly, the conflict, if any, between a ruling on the law of union responsibility applicable to damages and that applicable to injunctive relief is not a "direct and acknowledged" conflict with decisions of other courts of appeals and is, indeed, no conflict at all.

Republic Steel Corporation v. UMWA, 570 F.2d 467 (3rd. Cir. 1978) holds that summary judgment in favor of the UMWA International was erroneous in a situation where miners from one mine "picketed" a second, unrelated mine. The theory of the Third Circuit was that since the pickets belong to the same International Union, the International (but not the District or the Locals involved) would be responsible. See, 570 F.2d at 477-79. The case was remanded for further development of the record. 570 F.2d at 478-9.

Although *Republic Steel* is unique in the annals of the law of union responsibility, it is not a final decision on a final record. Because of its uniqueness and its interlocutory nature, it raises more questions than it answers.[8] Critically, the case below was simply not presented on the theory that the International Union has some newly-argued contractual obligation to deal with multi-mine problems. Although the Court below did squarely reject the application of *Republic Steel* (see A-8, 582 F.2d at 1350 n.4), the question simply

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[8]For example, how is the International Union in Washington to be notified of isolated picketing activities of miners from one time to another in rural Pennsylvania and what steps can the parent union reasonably take to deal with that situation. The case was remanded for development of factual questions as to the nature of the picketing and, apparently, the efforts of the International to end the stoppage.

was not presented to the trial court and is not raised on this record.

Whatever conflict the Third Circuit may, or may not, ultimately develop with the *Benedict-Haislip* rule followed by other circuits will have to be decided on a record, unlike the one in this case, which contains the "integrity of contract" arguments made in *Republic Steel*, and which involves inter-company and interstate activities and requests for prospective relief — none of which are present on record herein.

In sum, the unions conclude that there is no conflict between the Courts of Appeals. At worst to the unions, the decisions of the Third Circuit are suggestive that there may be a conflict of decisions in the future. The Third Circuit cases are part of an evolving and, at the present time, immature body of case law more indicative of *intra*-Circuit differences[9] than anything else. By contrast, the rulings applying and following the *Benedict-Haislip* rule are clear and longstanding. There is, therefore, no meaningful conflict and certiorari should be denied.

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[9]The decisions within the Third Circuit conflict sharply on the question of the responsibility of unions for unauthorized stoppages. One opinion appears to follow the *Benedict-Haislip* rule outright. *Penn Packing Co., Inc. v. Meat Cutters, Local 195*, 497 F.2d 888, 891 (1974). At least one Judge, Judge Gibbons, on the panel of *U. S. Steel* decision, discussed at length in text at p. 11 above, would apply *Benedict-Haislip* to damage actions. Although Judge Maris in *Eazor Express, Inc. v. Teamsters*, 520 F.2d 951, 960-963 (3d Cir. 1975), cert. denied 424 U.S. 935, limited the "all reasonable efforts" standard to collective bargaining agreements containing express no-strike agreements, on the strength of *Haislip Baking*, Judges Gibbons and Rosenn in *U. S. Steel*, supra., found his ruling to be dictum or "inopposite precedent" on the question of injunctive relief. See 534 F.2d at 1073 and 1079 n. 1. The panel in *Republic Steel*, supra, cites *Eazor Express* (570 F.2d 467), but does not cite the *U. S. Steel* decision mentioned above, and, critically, does not even attempt to explain its expansion of *U. S. Steel* into damage actions.

CONCLUSION

Wherefore, the Respondents pray that the petition for a writ of certiorari be denied.

Respectfully submitted,

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OCTOBER TERM, 1978

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CARBON FUEL COMPANY,

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

THE SUBSTANTIVE FEDERAL LABOR POLICY GOVERNING THE ISSUE IS NOT "WELL ESTABLISHED".

1. Respondents Incorrectly Restate The Question Presented.

Respondents assert in their opposing brief (p. 3) that: "The narrow question on the record and Petition * * * is, * * * whether the unions were obligated to take steps *beyond those already taken*—which the unions regarded as drastic and counterproductive—to end stoppages the Unions neither started nor encouraged." (Emphasis supplied) Respondents misconceive the holding of the lower court. The court did not hold that the steps "already

taken" by Respondents were all that could be reasonably required of them under the circumstances; but held that they were not required to take *any* reasonable steps to prevent or end the strikes. Respondents' "Restatement of Question Presented" (Br. p. 3) indirectly recognizes the indefensibility of the lower court's ruling that: "If [Respondents] had done nothing when plaintiff called on them to help get the men back to work, their would have been no liability on the part of the defendants." [App. A, pp. A9-10] The lower court did not set aside the judgments against the Respondents because it found that, as a matter of law, they had taken reasonable steps to end the strikes, a factual issue which the trial court jury resolved against them; but because it held that they were not obligated to take *any* steps to end the strikes, and that the trial court, therefore, erred in allowing the jury to determine whether the steps taken were reasonable.

2. The "Substantive Federal Labor Policy" Has not Been Established With Respect To The Question.

Respondents urge (Br. p. 3) that the lower court's ruling "is entirely consistent with substantive federal labor policy well established by this Court, the Courts of Appeals and the National Labor Relations Board." Petitioner submits that the "substantive federal labor policy" applicable to the issue presented has not been "well established by this Court"; and that, as pointed out in the petition, pp. 6-8, there is an irreconcilable conflict between various Circuit Courts of Appeals as to what that substantive federal labor policy is.

United Mine Workers v. *Cornado Coal Co.*, 259 U.S. 334 (1921); and *UMWA* v. *Gibbs*, 383 U.S. 715 (1966), relied upon by Respondents, do not establish the federal labor policy as to the obligation of a labor organization which

is the exclusive collective bargaining representative of its members to act affirmatively to prevent its members and subdivisions from acting in violation of the contract commitments which it has made as their representative in collective bargaining.

Cornado and *Gibbs, supra,* did not deal with the obligation of the UMWA to take action to end unauthorized strikes by its members and subdivisions in violation of a collective bargaining contract. *Coronado, supra,* was a suit for damages for an alleged conspiracy in violation of the Sherman Act, and for the violent destruction of property in furtherance of that conspiracy. No question concerning the obligation of the UMWA to maintain the integrity of its collective bargaining contracts against breaches by its subordinate unions and members was involved. In *Gibbs, supra,* the issue was to the sufficiency of proof, under Section 6 of the Norris-LaGuardia Act, to show that the UMWA had ratified violent acts of its members and Locals for which the plaintiffs sought damages in a tort action. The liability of a parent union for the violent and unlawful acts of its members and locals which it has not authorized or ratified is a different question from that of the obligation of a parent union to take reasonable steps to maintain the integrity of a collective bargaining agreement, entered into by it as the exclusive bargaining representative of its members, against repeated breaches by its members and locals.

The decisions of the Fourth and Sixth Circuits, relied upon by Respondents in their brief (pp. 4-5) as establishing the federal labor policy applicable to the question presented, represent but one side of the conflict between the Circuits pointed out in the petition, pp. 6-8. Nor is it correct that the decisions of the Fifth and Seventh Cir-

cuits, cited in Respondents' brief, p. 5, have aligned those Circuits with the view that the UMWA has no obligation to exercise all reasonable means to end strikes in violation of the contract. See Petition, p. 7, n. 2.

Respondents assert (Br. p. 7) that the federal labor policy of uninterrupted operation during the term of an agreement is not at stake, because "there was no agreement as to uninterrupted operation". This is not correct. The labor contracts contained an implied promise not to strike over disputes subject to settlement under the grievance and arbitration procedures, and explicitly bound the Respondents to "maintain the integrity" of that promise. *Gateway Coal Co.* v. *UMWA*, 414 U.S. 368 (1974).

Respondents further argue that the federal labor policy favoring labor stability during the life of collective bargaining agreements, and the enforceability of collective bargaining agreements to that end, must be sacrificed in the interests of concomitant federal policy "favoring the establishment and continued existence of labor unions". (Br. p. 7) Respondents assert that a requirement that they use all reasonable means to end strikes in violation of the implied no-strike provisions of the contract: "could mean the destruction of labor unions". There is, however, no decision of this Court, nor any otherwise established federal labor policy, that the Congressional intent, deliniated in *Textile Workers Union* v. *Lincoln Mills, 353 U.S.* 448 (1957), to make collective bargaining agreements enforceable against unions, is limited to judgments for damages against subordinate local unions of limited financial responsibility, and stops short of the recovery of damages for breach of contract from financially responsible parent unions which actually make and enter into such agreements.

The International Union, UMWA, not its subordinate locals, is the exclusive bargaining representative of all of its members. It is the bargaining agent that makes the contracts. It comes to the bargaining table purporting to represent all of its members, and holds itself out as able to enter into binding and meaningful commitments as consideration for the commitments made by the operators. As the court pointed out in *U.S. Steel Corp.* v. *UMWA*, 100 LRRM 2654 at 2659 (3rd Cir. Feb. 9, 1979): "The National Bituminous Wage Agreement of 1974 runs between each signatory employer and 'the International Union, United Mine Workers of America * * * on behalf of each member thereof.' In short, while each employer signed the 1974 Agreement, the International signed on behalf of all the union members. Individual Locals are not parties to the contract. The dispute resolution system established by the 1974 Agreement that begins at the mine level is a convenient method of resolving employee grievances; however, it cannot erase the overall contractual relationship running between [the coal operator] and the United Mine Workers on behalf of its members. In fact, Article XXIII on Settlement of Disputes never mentions the UMW Locals. Rather, the Article speaks in terms of resolving disputes between the Mine Workers and the Employer. * * *"

There is no federal labor policy that the International Union, in such circumstances, must be relieved of responsibility to use all reasonable means at its disposal to maintain the integrity of the contract it has made; or that it is to be immunized, because of policy favoring "the establishment and continued existence of labor unions", against liability for its failure to do so.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

Respondents' argument that "there is no conflict between the Courts of Appeals" (Br. p. 13) is based upon Respondents' wishful thinking that the courts which have held that the UMWA has a duty to "use its best efforts" to end strikes engaged in by its members and subdivisions in violation of the contract did not mean what they said. Thus, Respondents characterize the decisions of the Third Circuit in *United States Steel Corp.* v. *UMWA*, 534 F.2d 1063 (3rd Cir. 1976), *Republic Steel Corp* v. *UMWA*, 570 F.2d 467 (3rd Cir. 1978); and *Bituminous Coal Operators Association* v. *International, Union, UMWA*, 585 F.2d 586 (3rd Cir. 1978), as "part of an evolving and, at the present time, immature body of case law more indicative of *intra*-Circuit differences than anything else." (Br. p. 13) This argument by Respondents is surprising in the light of the Third Circuit's very recent decision in *U.S. Steel Corp.* v. *UMWA, supra,* (Decided Feb. 9, 1979) 100 LRRM 2654.

In *U.S. Steel Corp.* v. *UMWA, supra,* 100 LRRM at 2660, in which the Third Circuit reaffirmed its holdings that UMWA may be held liable for a failure to "exercise all reasonable efforts" to halt strikes in violation of the implied no-strike provisions of the contract, the court said:

> "* * * *The International and the District do not dispute* that under the reasoning of this court, in *Republic Steel Corp.* v. *United Mine Workers*, 570 F.2d 467, 97 LRRM 2836 (3rd Cir. 1978), they may be held liable for failure to 'exercise all reasonable efforts to halt conduct of [their] members which is proven to be unlawful.' " * * * (Emphasis supplied)

Thus, Respondents appear to have conceded in the Third Circuit, contrary to their argument here, that their obligation to "exercise all reasonable efforts" to end strikes by their locals and members in derogation of the contract arbitration clauses is the established law in the Third Circuit.

Respondents' efforts to portray the Eighth Circuit's decision in *Wagner Electric Co.* v. *Local 1104 Electrical Workers*, 496 F.2d 954 (1974) as being "based on fact findings that the strike was informally authorized or ratified" (Br. pp. 9-10), ignores the court's holding that the fact that the union did not authorize the strike, and had disavowed it and encouraged its members to return to work, was not sufficient to relieve it of liability; and the court's plain statement that: "A union is required to use its best efforts to return striking workers to their jobs if it is not to be held responsible for their actions." Id. p. 956

Respondents' suggestion (Br. pp. 11-12) that the Third Circuit's view that the International may be held liable for a failure to exercise all reasonable efforts to halt strikes is really applicable only to claims for injunctive relief is refuted by that court's decisions in *Republic Steel Corporation* v. *UMWA, supra,* and *U.S. Steel Corp.* v. *UMWA, supra,* (1979), in both of which the principle was applied to the liability of the UMWA in damages. Likewise, Respondents' claim that the Third Circuit's decisions are peculiar to strikes "which involve intercompany and interstate activities and requests for prospective relief" (Br. p. 13), is refuted by *U.S. Steel Corp.* v. *UMWA, supra,* (1979), in which the UMWA conceded, and the court held, that the "all reasonable efforts" requirement was applicable in the Third Circuit to a suit

for damages for a past strike, involving the mines of a single employer, in the same state.

Finally, Respondents' further suggestion (Br. p. 13) that the record herein does not contain "the 'integrity of contract' arguments made in *Republic Steel", is* unfounded. The "integrity of the contract" language is contained in both of the contracts before the Lower Court; and it was specifically relied upon by the Petitioner in that Court, and in the Trial Court. The Lower Court clearly refused to give it the effect given to it by the Third Circuit, when it said in its opinion (A-8) that: "In [U.S. Steel v. UMW, 534 F.2d 1063] the Third Circuit stated that '[a] covenant to maintain the integrity of the contract necessarily embraces a reasonable efforts obligation to comply with the [implied] no-strike promise.' Id., at 1073. In all deference, we cannot agree with this conclusion." The Lower Court further noted, A-8, n. 4, that: "We also decline to follow the rationale applied in the recent case of *Republic Steel Corp.* v. *U.M.W.A. of America,* 570 F.2d 467 (3rd Cir. 1978)."

CONCLUSION

For all the reasons above asserted, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY,

Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, United Mine Workers of America; and LOCAL UNIONS NOS. 6572, 7626 and 2236, United Mine Workers of America,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER, CARBON FUEL COMPANY

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER, CARBON FUEL COMPANY

I. OPINION BELOW

The opinion of the Court of Appeals is printed in the Appendix to the Petition for Certiorari ("P.A.") at pp. A1-A10 and is reported at 582 F.2d 1346. The District Court did not render an opinion.

II. JURISDICTION

The opinion of the Court of Appeals was announced on September 21, 1978. Petitioner's timely petition for rehearing, with a suggestion for rehearing *en banc*, was denied on October 31, 1978. The mandate was stayed by the Court of Appeals pending disposition of the case in this Court on November 13, 1978. The petition for a writ of certiorari was filed on January 29, 1979, and was granted on March 19, 1979. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

III. QUESTION PRESENTED

When, if ever, may a union be held liable for unauthorized strikes in violation of a collective bargaining agreement because of the union's failure to take reasonable steps to end or prevent the strikes?

IV. STATUTE INVOLVED

This case involves § 301 of the Labor-Management Relations Act (the "Act"), 61 Stat. 156, 29 U.S.C. § 185, printed in P.A. at pp. B1, 2.

V. STATEMENT OF THE CASE

(1) Proceedings in the Courts Below.

(a) In the District Court.

This is an action under § 301 of the Act by Carbon Fuel Company (the "Employer" or "Carbon") against the International Union, United Mine Workers of America ("International"), which is the duly recognized exclusive bargaining agent for the Employer's production and maintenance employees, and its administrative subdivisions, District 17, United Mine Workers of America ("the District"), and Local Unions Nos. 6572, 7626 and

2236, United Mine Workers of America ("the Locals"), all of which defendants are sometimes collectively referred to herein as "Unions". The action seeks damages for a series of forty-eight strikes occurring during the years 1969-1973, inclusive, allegedly in violation of the terms of two collective bargaining agreements between the Unions and the Employer, the National Bituminous Coal Wage Agreement of 1968 and the National Bituminous Coal Wage Agreement of 1971 (contracts). Of those forty-eight strikes, thirty-one were over issues arbitrable between the Employer and the Unions, and the other seventeen, while involving an arbitrable issue of whether the Unions had the right to engage in the strike, had non-arbitrable issues as their underlying causes.

The case was tried before a jury in the United States District Court for the Southern District of West Virginia. At the conclusion of the evidence, the District Court denied the motions of the International and District for a directed verdict based upon their claim that there was insufficient evidence of their liability for the strikes. The Court further directed the jury to find that all of the strikes, no matter what their underlying causes, were violations of the contracts and that the Locals were responsible for the strikes because of the mass actions of their members and officers in engaging in them. The Court submitted the questions of the amounts of damages, and the responsibility of the District and International, to the jury. Its charge relating to International and District liability told the jury that the International and District had a responsibility under the contracts to use all reasonable means available to them to prevent and end strikes in violation of the contracts, and that from such

time as they had an opportunity to use such means and failed to do so, they were liable for the strikes. (A. 197)

The jury returned individual verdicts as to each strike, awarding damages individually against the Locals in a cumulative total amount of $722,347.43, against the District in the total amount of $242,130.80, and against the International in a total amount of $206,547.80. The verdicts were joint and several, rather than cumulative. They reflected the jury's determination under the Court's "all reasonable means" instruction that the District and International were responsible with respect to only some of the strikes, and only a portion of the damages resulting from the strikes.

(b) In the Court of Appeals.

Upon appeal, the United States Court of Appeals for the Fourth Circuit reversed the judgments as to the seventeen strikes whose underlying causes were issues not arbitrable under the contracts, as to all of the Unions; and affirmed the judgments as to the remaining thirty-one strikes, as to the Locals only. As pertinent here, the Court of Appeals reversed all judgments against the District and International Unions upon the basis that under the contracts they had no obligation to use "all reasonable means" to end and prevent unauthorized strikes, but rather that the standards for their liability, as higher union entities, were those established in the case of *United Construction Workers v. Haislip Baking Company*, 223 F.2d 872 (4th Cir. 1955), cert. denied, 350 U.S. 847 (1955). Quoting from that case, the Court of Appeals stated the obligation of a parent union with regard to a strike not called or formally authorized by it to be as follows:

> " 'If [the representatives of UMWA] had done nothing when plaintiff called on them to help get the men back to work, there would have been no liability on the part of the defendants. This being true, defendants were not rendered liable by the efforts which these men made to bring about an adjustment of the difficulty, even if they did not do everything that they might have done to that end. The question is not whether they did everything that they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike. There is no evidence of any sort that they did.' " 582 F.2d at 1351. P.A. pp. 9, 10.

Upon that holding, the Fourth Circuit vacated the judgments as to the International and District Unions, and remanded the case to the District Court with directions to dismiss as to the International and District. It is this action by the Fourth Circuit which is before this Court.

(2) Summary of Evidence Before The District Court.

(a) The Parties.

Carbon is a corporation engaged solely in the business of mining, preparing and selling coal. Its operations are in two geographically separate divisions located in central West Virginia. Those divisions are denominated its Winifrede and Carbon Divisions. In each division are a number of mines and related facilities, such as repair shops and coal preparation plants. (A. 19, 21) Carbon has recognized the International Union as the exclusive bargaining agent for its production and maintenance employees at its operations since the 1930's. (A. 20)

The International Union has structured itself through its Constitution into three tiers. At the top is the Inter-

national Union, which is composed of all members. (A. 194) At the second level are the Districts, which are subordinate branches of the International and have jurisdiction over all members of the International within geographic districts determined by the International. On the bottom tier are the various local unions, which likewise have jurisdiction established by the International Union. The District involved here is District 17, and the locals, Local 2236 (with jurisdiction over Carbon's Winifrede Division) and Locals 6572 and 7626 (with jurisdiction over separate mines and related facilities in the Carbon Division).

The power of the International to control the actions of the districts and locals is extensive under its Constitution. The International has "supreme legislative, executive and judicial authority over all members and subordinate branches" (A. 194); Districts and Locals must be chartered by and be subject to the laws of the International Union, which has the power to revoke their charters and to create provisional governments of the Locals and Districts. (A. 194, 95) The International and the Districts have a right to reverse any action taken by a Local considered by them to be opposed to the interests of the United Mine Workers or any Local Union or District involved. (A. 195) Only the International Union has the right to call a strike. (A. 91, 121) During the vast majority of the time here involved, the International had complete control, through trusteeship, of District 17. (A. 58, 59)

(b) Collective Bargaining Between The Parties.

Both the Unions and Carbon relied upon the collective bargaining history. As indicated above, Carbon has

recognized the International as the exclusive bargaining agent for its employees since the 1930's. Since 1941, Carbon has been a party to essentially all national contracts entered into with the International. The method of collective bargaining for new agreements has been the same in all essential particulars.

Carbon is and has been a member of Southern Coal Producers Association, a multi-employer association of coal operators formed for purposes of bargaining collectively with the United Mine Workers of America. Prior to 1948, Southern Coal Producers' Association acted as agent for Carbon and other coal operators located in the southern Appalachians in negotiating for new collective bargaining agreements. (A. 27) After 1948, Carbon has participated in bargaining through Southern's membership in the Bituminous Coal Operators Association, a national multi-employer association of coal operators formed exclusively for purposes of negotiating contracts with the United Mine Workers of America. Id.

Whenever negotiations for a new contract have been necessary, Southern Coal Producers, prior to 1948, or Bituminous Coal Operators Association, since 1948, have met and bargained with the International Union, as the exclusive bargaining agent for all of the production and maintenance employees of the operator members of those associations. (A. 28) The Locals and Districts have played such part in the negotiations as the International has, by its Constitution and otherwise, from time to time directed. Only the International Union, with such participation of subordinate branches as it has established and permitted, has signed the successive national agreements entered into since 1941. (A. 28, 29) Only the two multi-employer associations previously

referred to have executed the agreements, in each instance, on behalf of their operator members.

Each contract since the 1941 agreement has contained a broad mandatory grievance and arbitration procedure. That procedure contemplates settlement through it of differences "as to the meaning and application of the provisions of [the agreement], differences arising about matters not specifically mentioned in the agreement, or any local trouble of any kind." (A. 136-186) The scope, and mandatory nature, of the grievance and arbitration procedure of the various agreements, from the 1941 agreements to those sued upon in this action, have not significantly changed, and are not legally different from those provisions considered by this Court in *Gateway Coal Co.* v. *UMWA*, 414 U.S. 368 (1974).

The grievance provisions of the two contracts sued upon, and the procedure followed by the parties in implementing them, were essentially the same. The procedure under the National Bituminous Coal Wage Agreement of 1968 involved five steps. In the first step the aggrieved employee or employees took up the matter with his or their immediate foreman and attempted at that level to resolve it. If no resolution occurred, the grievance proceeded to the second step, where it was considered by a member of management designated by Carbon, representing the Company, and the grievant and his Mine Committee (a committee elected by the members of the Local Union at the facility involved). If no settlement was reached at that step, the matter was then referred to the third step where the grievant was represented by a District representative, and the Employer by a different management representative. Usually the Employer's representative was an employee of

Kanawha Coal Operators Association, an association of operators in the area in which Carbon operates, which was created for the purpose of handling grievances on behalf of member operators. If no agreement was reached at the third step, the grievance was referred to a joint board, composed of two representatives of the Union and two of the employer. Most often, the Union representatives were District officials, and the employer representatives were employees of Kanawha Coal Operators Association. If no agreement was reached at that stage, the matter was referred to an arbitrator selected by the parties for resolution. Evidence was normally taken and recorded at the third step. The evidence was transcribed and submitted, with the briefs, to the arbitrator. No official of the International Union participated at any level. (A. 47-51)

The procedure was the same under the 1971 Agreement, except that there was a separate, expedited procedure in the handling of discharge cases. That expedited procedure skipped the first, second and fourth steps of the regular grievance procedure, and provided for significantly shortened time periods between the steps. (A. 184, 85)

Although the grievance procedure provisions of the contract were essentially unchanged from the first agreement in 1941, other provisions relating to the obligation of the Unions to resolve matters through the grievance procedure other than by strikes have substantially changed. In the 1941 Southern Wage Agreement, and Appalachian Joint Wage Agreement, there was contained, in addition to the grievance procedure, the following provisions:

"A strike or stoppage of work on the part of

> the Mine Workers shall be a violation of this Agreement." (A. 137, 142)

This provision was carried forward in the National Bituminous Coal Wage Agreement of 1946. (A. 144) However, the National Bituminous Coal Wage Agreement of 1947 made substantial changes.

First, the National Bituminous Coal Wage Agreement of 1947 provided as follows:

> "It is the intent and purpose of the parties hereto that this Agreement will promote and improve the industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreement covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement *during such time as such persons are able and willing to work.*" [Emphasis Added] (A. 147)

Moreover, in the provision with regard to the carrying forward of District Agreements, the 1947 Agreement provided:

> "Prior practice and custom not in conflict with this Agreement may be continued, but any provisions in District or Local Agreements providing for the levying, assessing or collecting of fines or providing for 'no strike,' 'indemnity' or 'guaranty' clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this Agreement." (A. 148)

Finally, the "Miscellaneous" clause of that contract contained the following provisions:

> "1. Any and all provisions of either the Appalachian Joint Wage Agreement of June 19, 1941 or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'Penalty' clause or clauses or any clause denominated 'illegal suspension of work' are hereby rescinded, cancelled, abrogated and made null and void.
>
> * * *
>
> "3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions drawing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry." (A. 150)

These provisions were carried forward into the National Bituminous Coal Wage Agreement of 1948. (A. 151)

Again, substantial modifications were made in the National Bituminous Coal Wage Agreement of 1950. First, the "willing and able" language contained in the 1947 Agreement and carried forward into the 1948 Agreement was removed from the Coal Wage Agreement of 1950. (A. 153) The provisions relating to the repeal of "no strike" or illegal suspension of work clauses in the District and past Wage Agreements were retained. However, in the "Miscellaneous" section, the parties added a fourth section as follows:

> "4. United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this Agreement." (A. 156, 57)

The 1951 Agreement carried forward the provision of the 1950 Agreement above referenced. (A. 157) There was, however, some change made in the National Bituminous Coal Wage Agreement as amended in September, 1952. That Agreement rewrote the "Miscellaneous" clause by striking out subsection 4, quoted above, and combining it with the old subsection 3 (originally appearing in the 1947 Agreement), so that the new combined section read as follows:

> "The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of the Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts." (A. 160)

The amendments to the Agreement, made effective in September of 1955, September of 1956, December of 1958, April of 1964, and April of 1966, did not affect the relevant provisions of the contract. Nor was there any change in the new contract of 1968, which is the first of the two contracts sued upon in this action. (A. 173-78)

In the National Bituminous Coal Wage Agreement of 1971, the "Miscellaneous" portion of the contract was removed. The first paragraph of that "Miscellaneous" portion, rescinding no strike clauses in prior agreements and first adopted in the contract in 1947, was reduced to a note appearing at the beginning of the contract.

The third paragraph of the "Miscellaneous" section was carried forward in Article XX, entitled "Maintain Integrity of the Contract". (A. 186, 87) The wording was not changed.

(c) Wildcat Strikes.

The evidence was uncontradicted that before, during and after the period covered by the lawsuit, wildcat strikes were a normal and regular occurrence in the UMWA represented coal industry, not only at the operations of Carbon, but also at the operations of other signatories in the area. Specifically, the evidence showed that during the period of the suit Kanawha Coal Operators Association represented operators of between 75 and 90 separate mines. During the period October, 1968 to October, 1969, there were a total of 71 separate wildcat strikes at those operations, which resulted in the mines of members of the Association being shut down for 819 mine days. For the similar period of October, 1969, through October, 1970, there occurred 60 such strikes with a loss of 371 mine days. For the period October, 1970 to October, 1971, the figures are 216 strikes and 429 mine days lost. For the period of October, 1972 to October, 1973, there were a total of 163 strikes with 563 mine days lost. (A. 32, 33) It is likewise uncontroverted that there occurred at Carbon's operations a total of 48 wildcat strikes during the period of 1969 through 1973. All figures exclude contract strikes engaged in for the purposes of bringing economic pressure upon operators to agree to bargaining demands made in negotiations for new contracts, which strikes were authorized by the International Union. (A. 32)

At the occurrence of each such strike it was the normal and regular practice of Carbon to immediately notify the

Kanawha Coal Operators Association of the existence and cause of that strike. (A. 52) Kanawha Coal then notified District 17 of the United Mine Workers of America of the strike, and District 17 immediately notified the office of the President of the International Union — during this period of time W. A. "Tony" Boyle. (A. 59, 60) Moreover, it was the normal practice of the officers of the local Union involved to notify the District of such strikes as soon as they occurred. By this dual practice, the International Union was notified by ten o'clock in the morning of each day of each strike within the District. (A. 60) Periodically, the telephoned strike reports were reduced to writing and delivered to the office of the President of the International Union. Id.

The International Union had long been aware of the strike problem. Under date of October 24, 1951, the International President, Vice President and Secretary-Treasurer, on behalf of its Executive Board, sent a letter to all members of the United Mine Workers of America reflecting the concern of the International about a "wave of unauthorized local strikes." The International Executive Board in that letter urged all members, Local Union officers and Committeemen, and District and International officers to use their efforts and influence to prevent the occurrence of unauthorized strikes, which were recognized to be in contravention of the Constitution and in opposition to the established policies of the United Mine Workers of America. (A. 190, 91) These directives were not followed. Therefore, on May 17, 1956, the International Union adopted a further declaration of policy, which was likewise communicated to the officers and members of the Union. That declaration of policy recognized that local strikes were prohibited by the earlier

directive, and that some Local Unions had ignored that policy. Upon that basis, the International Executive Board (the governing body of the Unions between conventions) affirmed its declaration of October, 1951, and instructed compliance therewith. The Executive Board further advised that Local Unions failing to abide by that directive would be subject to discipline and penalties to be imposed by the Board; that Local Union officers "giving aid and comfort" to strikes, or who were "guilty of negligence in the failure to prevent them", would be subject to disciplinary action along with individual members guilty of promoting, conducting and prolonging such strikes, and that repetition of such offenses would bring further and more severe penalties. (A. 192, 93)

On September 3, 1966, the previous two directives of the International Executive Board having not accomplished their goal, the Board resolved that: "when it is proven that any member or members were engaging in promoting, conducting or prolonging an unauthorized work stoppage, such members shall be penalized the sum of five dollars for each day of such unauthorized stoppage Such penalty shall be in addition to any penalty imposed by the Local Unions involved." (A. 187-89)

Each of these directives of the International Union was delivered to all the members of the Union. Not one was ever followed through at the operations of Carbon, or at the operations of other members of the Kanawha Coal Operators Association. No discipline of any kind or type was ever taken during the period in question by the International or District against any Local, Local officer, or Local member for engaging in, promoting or conducting a wildcat strike. (A. 61, 62;

78; 82; 87; 92, 93; 100; 107; 115; 131) Indeed, the International itself did absolutely nothing with regard to wildcat strikes during this period. Instead, it relied entirely upon the districts to take any action to be taken. The District's reaction was uniform. It relied entirely upon persuasion to prevent and end the increasingly numerous wildcat strikes.

The actions of the District and Local Unions were uniform for each strike. Whenever a strike occurred, the District representative responsible for that Local immediately contacted the officers of the Local to determine the reason for the strike. He then urged that a meeting of the Local be called. The District representative usually attended those meetings. At the meetings, the District representative routinely directed the members to return to work. (A. 64-66) Frequently he would instruct the men concerning the power and authority of the International and District to take disciplinary action against the Local, and against the members themselves. (A. 104; 115, 16;) Despite those remonstrations, the strikes often went on for days before they ended. In instances in which the members either voted not to work, or simply did not return to work, an additional meeting would be called with additional remonstrations and efforts to persuade the strikers to return to work. In no instance was the power and authority of the International and District Unions to discipline recalcitrant Locals and members, to impose trusteeship upon recalcitrant Unions and replace their recalcitrant local officers, or to "reverse" the actions that Local Unions had taken, employed.

The actions of the District and Local officers is best described in the following testimony of Lester Kincaid,

the President of Local 2236 during much of this period:

"Q Now you said that as soon as you had a work stoppage, you called a local union meeting and at that local union meeting you called it at the bathhouse and at that local union meeting you told them about the seriousness of the work stoppage and you told them that the company would get a temporary restraining order from federal court to get them back to work and told them if they violated the temporary restraining order, they might be held in contempt of court and fined. Is that what you told them?

A Yes sir, I told them that several different times.

Q Did you tell them anything about the seriousness of it, other than the possibility that they might get fined in federal court?

A Oh yes. I told them about that because everytime—

Q I mean anything other than federal court?

A I would tell them that they could be fined through the international union.

Q And did you make specific reference to the constitutional provisions relating to international discipline and district discipline for engaging in an unauthorized work stoppage?

A The biggest part of them knew that already, Mr. Roles.

Q So you didn't need to tell them?

A I figured the biggest part of them knew about it already.

Q Did you tell them about that every meeting you had or practically every meeting?

A It was just like a scratched record, Mr. Roles. I told them each time over and over.

Q You kept telling them again and again?

A Yes, sir.

Q And you kept ordering them back again and again?

A Yes, sir.

Q Now you ordered them back everytime and you warned them about international discipline everytime. How many times has the international disciplined them?

A None as I know of.

Q How many times has the district disciplined them?

A None as I know of.

Q Your orders weren't worth a dime, were they?

A I believe we said that in June 1974. Yes, sir.

Q And that's true, isn't it?

A Yes, sir.

Q And the district's orders weren't worth a dime either were they?

A At that time, I would say no. If they didn't return to work, nothing wasn't worth a dime. It wasn't even worth a penny." (A. 99-101)

Various present and past officials of the unions testified as to their opinions as to the usefulness of the various disciplinary and other affirmative means available to the International and District which could have been taken to try to prevent and terminate the strikes, but which were not attempted. Their testimony was to the effect that in their opinion, no matter what the individual circumstances of a particular strike, such actions would have been counter-productive. (A. 79; 93; 120)

VI. SUMMARY OF ARGUMENT

I. It is the position of Carbon that a no strike clause, whether expressed or implied, places upon the union entering into it, without more, the obligation to use all

reasonable means to prevent and end strikes by its members and subordinate branches in violation of that clause, regardless of whether or not the union brought about or authorized the strikes.

The obligation undertaken by a union not to strike during the term of a collective bargaining agreement is illusory and of no value if that union may do nothing when its members and subordinate branches violate the union's promise. The duty to use all reasonable means to prevent and stop such breaches of labor contracts is essential to the maintenance of collective bargaining. As such, that duty on the part of unions signatory to collective bargaining agreements containing expressed or implied "no strike" clauses is implied under the normal rules of contract law, and is likewise required by the policy of our national labor laws.

II. In addition to, and regardless of, the implied duty to make all reasonable efforts to prevent and end wildcat strikes, which duty arises from the promise not to engage in such strikes, the District and International contractually obligated themselves in the National Bituminous Coal Wage Agreements of 1968 and 1971, by the maintenance of the integrity of the contract clauses contained therein, to use all reasonable means to prevent and terminate strikes over arbitrable issues. No rational meaning can be assigned to those clauses except that the parties thereto obligated themselves to use all reasonable means to see to it that the contracts, including the implied no strike provisions contained in them, are enforced and obeyed. With respect to wildcat strikes, an undertaking to "maintain the contract" can mean no less than a duty to take affirmative action to prevent and stop its breach. The collective bargaining history,

instead of negating such a meaning, as indicated by the Fourth Circuit, (P.A. p A. 7, 8) actually requires such an interpretation when properly considered.

VII. ARGUMENT

A. A UNION BOUND BY A COLLECTIVE BARGAINING AGREEMENT CONTAINING AN EXPRESS OR IMPLIED NO-STRIKE CLAUSE HAS THE OBLIGATION, WITHOUT MORE, TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES BY ITS MEMBERS AND SUBORDINATE BRANCHES IN VIOLATION OF THAT CLAUSE.

(1) The Legal Standard For Interpretation Of Collective Bargaining Agreements.

Since this is a case under §301 of the Act, the proper source of the law upon which this Court must decide the issue presented is the policy of our national labor laws enacted by the Congress. See *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 456-57 (1957), in which this Court said:

> "We conclude that the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." [Citations omitted]

In addition, this Court has relied, with less emphasis, upon "accepted principles of traditional contract law."

Teamsters v. *Lucas Flour Co.*, 369 U.S. 95, 105 (1962). The application of both of these principles of construction clearly shows that the District Court's charge was correct, and that the Court of Appeals erred in ruling that a Union may do nothing when its members and subordinate branches breach a no-strike obligation to which the Union has committed itself in contract negotiations.

(2) The Policy Of Our National Labor Laws Is That Collective Bargaining Agreements, And Particularly The Obligation To Settle Disputes Peacefully Through Grievance and Arbitration Procedures Therein, Shall Be Effectively Enforceable In Federal Courts.

In summing up the congressional intent in enacting § 301 of the Act, this Court said in *Textile Workers Union* v. *Lincoln Mills, supra,*:

> "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." 353 U.S. at 455

In short, the essential purpose of §301 was to promote effective enforcement of collective bargaining agreements in Federal Courts so that the making and maintaining of such agreements will promote industrial peace. That clear congressional intent and purpose is evident in the legislative history of §301. Mr. Justice Frankfurter, in his dissent in *Lincoln Mills, supra,* collected the extensive references in that history to "discussion of the problem of contract responsibility" and "the desirability of having

collective agreements enforceable against the union as well as the employer". *Textile Workers Union* v. *Lincoln Mills,* (Appendix to Dissent) 353 U.S. at 513 and 523.

Other provisions of the Act evidence that same policy. Thus § 704(a) of the Act, 29 U.S.C. § 174(a), provides:

> "(a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—
>
> (1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, * * *"

Likewise, § 203(d) of the Act, 29 U.S.C. § 174(d), provides:

> "(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

By these provisions, Congress intended to encourage the grievance-arbitration provision found in most collective bargaining agreements today, as the exclusive manner of resolving disputes arising during contract terms. As all of these provisions clearly show, the policy Congress sought to serve in enacting the Act, and particularly § 301 thereof, is that expressed in Senate Report No. 105, 80th Cong., 1st Sess., p. 16, wherein it is stated:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> "Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce."

This Court has constantly, over many years, remained faithful to that legislative purpose, and fashioned law in its decisions which effectuate it. Thus, in *Textile Workers* v. *Lincoln Mills of Alabama, supra,* this Court held agreements to arbitrate in collective bargaining contracts to be specifically enforceable by injunction. In the "Steelworkers Triology", *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *Steelworkers* v. *Warrior and Gulf Mfg. Co.,* 363 U.S. 574 (1960); and *Steelworkers* v. *Enterprise Corp.,* 363 U.S. 593 (1960), this Court established the principles that Courts should read arbitration clauses broadly in determining whether to order submission of issues to arbitration and that Courts should refuse to enforce decisions rendered by arbitration only in very limited circumstances. Further, in *Teamsters Local 174* v. *Lucas Flour Co., supra,* this Court, relying upon this same policy of our national labor laws, construed a mandatory grievance and arbitration procedure as giving rise to an implied promise not to strike over issues subject to settlement under that procedure. In *Boys' Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970), the Court accommodated the anti-injunction policy of the Norris-

LaGuardia Act, 29 U.S.C. § 101 *et seq.*, and particularly section four thereof, 29 U.S.C. § 104, with this overriding policy of establishing labor peace by the enforcement of agreements to arbitrate; and, despite the clear language of Norris LaGuardia, permitted Federal Courts to grant strike injunctions where the strike is over an issue which the union has promised to resolve by a mandatory grievance and arbitration procedure. In *Gateway Coal Co.* v. *United Mine Workers of America, supra,* the Court refused to carve out an exception to *Boys' Markets* for disputes over the issue of safety.

This Court has not retreated from its constant adherence to this clear policy of our national labor laws. Nothing in *Buffalo Forge Co.* v. *Steelworkers,* 428 U.S. 397 (1976), which limited *Boys' Markets* to circumstances where the underlying cause of the strike was arbitrable between the employer seeking the injunction and the union whose strike is sought to be enjoined, casts doubt upon the principles established over the long series of cases discussed above. The basic rationale of *Buffalo Forge* is that a strike which is not in derogation of the duty to arbitrate does not contravene this well established policy, because such a strike has "neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain". *Buffalo Forge Co.* v. *Steelworkers,* 428 U.S. at 408. Nor has Congress seen fit to amend the Act in the face of this uninterrupted series of decisions by this Court applying it.

(3) Effective Implementation of This Policy of Our National Labor Laws Requires That Unions Use All Reasonable Means To Prevent and Terminate Wildcat Strikes By Their Members and Subordinate Branches.

The record in this case shows that the well established

policy of our national labor laws has been a failure in the coal industry in general and at the operations of Carbon in particular. Thirty-one strikes over arbitrable issues in a four-year period is not the "industrial peace through faithful performance" envisioned by the Congress in enacting § 301. The failure of that policy is not due to any inherent defect in the policy. As this Court knows, it has generally worked well in American industry. Rather, it is submitted, the failure of that policy as reflected by this case arises from the fact that under the law as enunciated by the Fourth Circuit in this case, there is no real obligation upon the International and District to faithfully perform their agreements. The promises which they solemnly made, to resolve disputes arising under the contract without resort to economic coercion, are illusory on the part of the Unions if the only financially responsible tiers of the Unions, the Districts and International, may sit by with impunity while their judgment-proof Locals flagrantly violate those promises.

The facts in this case show with overwhelming force the necessity of requiring unions to take reasonable steps to prevent and end wildcat strikes by their members in order to fulfill the clear, important policy of our national labor laws. If unions such as the International and District can, in the words of Senate Report 105, *supra,* stand by with "relative impunity" and do nothing while their members and subordinate branches violate the collective bargaining commitments they have made, then such agreements "do not tend to stabilize labor relations." If such agreements are unenforceable because responsibility for breaches attaches only to financially irresponsible Locals, then Carbon and other employers have "no effec-

tive method of assuring freedom from economic warfare for the term of the agreement".

(4) Under Accepted Principles of Traditional Contract Law a Union Bound by a Collective Bargaining Agreement Containing a No-Strike Clause Has a Duty to Use All Reasonable Means to Prevent and Terminate Strikes in Violation of That Agreement by Their Members and Subordinate Branches.

The International bargained for and signed each of the contracts. In each, the International promised to resolve all disputes through the grievance and arbitration procedure, implicitly without strikes over such disputes. Thereafter, the International effectively did nothing. The performance of its obligations to resolve disputes not national in character was assigned to its districts and locals, here the District and the Locals. The Locals repeatedly violated that obligation. The jury found, and it is not subject to question here, that the International and the District (for and on behalf of itself or the International) failed to exercise all reasonable means to end such violations by the Locals and their members. Under accepted principles of traditional contract law, the International and District are liable for these breaches by their Locals and members.

First, it is accepted and undisputed contract law that the mere assignment of an obligation under a contract does not relieve the original obligor of responsibility for its performance. The proposition is well stated in 4 Corbin on Contracts, § 866 (West Publishing Co., 1951), where it is said:

> ". . . No duty can ever be effectively assigned, if we adhere to our description of an assignment as a unilateral expression of the assignor. Applying that definition to duties instead of rights, we have: An assignment is an expression of intention by the assignor that his duty shall immediately pass to the assignee. Many a debtor wishes that by such an expression he could get rid of his debts. Any debtor can express such an intention, but it is not operative to produce such a hoped for result. It does not cause society to relax its compulsion against him and direct it toward the assignee as his substitute. In spite of such an 'assignment,' the debtor's duty remained absolutely unchanged. The performance required by a duty can often be delegated; but by such a delegation the duty itself is not escaped."

Thus, the International's assignment of its obligation to the locals and Districts would not, under traditional contract principles, relieve it of that obligation. Only performance by those subordinate branches would do so.

As indicated above, a construction of the contracts here to permit the International to relieve itself of its obligations simply by delegating them to its Locals would effectively render the "no-strike" promise illusory. This fact was recognized in *Eazor Express Inc.* v. *Teamsters*, 520 F.2d 951 (3rd Cir. 1975). There the Court said:

> "A no-strike agreement would be illusory indeed were a union to be permitted to avoid all responsibility under it for the duration of a prolonged strike which was being carried on by the concerted action of all its members employed in the struck operation, merely because the strike was not initially authorized or called by the union as an organization or by those of its officers who were specially empowered to do so. Rather than to construe a contract as producing such a result, the courts will favor a construction making the mutual promises binding and giving the contract legal

> effect. 1A Corbin on Contracts 8-9; 3 Corbin on Contracts 168-191; 17 Am. Jur. 2d 452." 520 F.2d at 960.

That same principle was applied to the language contained in the contracts here sued upon in *Republic Steel Corp.* v. *United Mine Workers of America*, 570 F.2d 467 (3rd Cir. 1978) and *Bituminous Coal Operators Association* v. *United Mine Workers of America*, 585 F.2d 586 (3rd Cir. 1978).

It is not Carbon's position that traditional contract law principles should be employed to establish a rule that unions are absolutely liable for contract violations by their members and subordinate branches. Some accomodations must be made for the differing structures of unions and the rights of their members and subordinate branches as compared to those of businesses. However, this accomodation does not require the obliteration of the traditional principles of contract law that a party to a contract has an obligation to act affirmatively to see to the performance of the contract and that contracts will be construed so as to provide for real, rather than illusory, promises.

B. ASSUMING, ARGUENDO, THAT THERE WAS NO IMPLIED COMMITMENT ON THE PART OF THE DISTRICT AND INTERNATIONAL TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES IN VIOLATION OF THE CONTRACTS, SUCH AN OBLIGATION IS PROPERLY IMPLIED FROM THE TERMS OF THE CONTRACTS THEMSELVES.

Both the contracts sued upon contain the specific promise by the Union to "maintain the integrity" of the contract, and that "all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Disputes' [grievance and arbitration] article of this Agreement." (A. 178; 186, 87) In *United States Steel Corp.* v. *United Mine Workers of America*, 534 F.2d 1063 (3rd Cir. 1976), the court held that this specific language:

> "* * * vitiates [UMWA's] claim that an express contractual basis for implying a reasonable efforts obligation is lacking in this case. From *Lucas Flour* we know that a no-strike undertaking will be implied from a grievance and arbitration clause. A covenant to maintain the integrity of the contract necessarily embraces a reasonable efforts obligation to comply with the no-strike promise." 534 F.2d at 1073.

It is submitted that the Third Circuit's reasoning is unasailable. The language can have no other meaning.

The Fourth Circuit rejected this approach on the basis of the bargaining history. (PA pp A7, 8.) The history relied upon by the Fourth Circuit was that recited in *International Union, UMWA*, v. *NLRB*, 257 F.2d 211 (D.C. Cir. 1958) [overruled, sub silentio, in *Gateway Coal Co.* v. *United Mine Workers of America*, *supra* 414 U.S. at 384 (n.14)]. The problem with this reliance is that the Fourth Circuit decision considered only a *part* of the bargaining history and that the District of Columbia court's recitation of the bargaining history is *not* accurate. Moreover, even with that bargaining history, as inaccurately stated therein, the District of Columbia Court actually interpreted the "maintenance of integrity" language relied upon by Carbon as imposing a contractual obligation (however illusory) on the International to act affirmatively to prevent and end strikes over arbitrable issues. *International Union, supra*, 257 F.2d at 218.

The District of Columbia Court of Appeals' decision

relied upon by the Fourth Circuit for the bargaining history correctly recites that: an express "no strike" clause existed in the agreements between the parties prior to the 1947 Agreement (A. 137, 142); the 1947 Agreement, and all agreements subsequent to it, rescinded such express "no strike" clauses (A. 150 et seq.); and the 1950 Agreement contained a clause expressly requiring the parties to "exercise their best efforts through available disciplinary measures" to prevent work stoppages (A. 156, 57), which clause was eliminated in 1952 and has not reappeared. Upon the basis of the parties' elimination in 1952 of the "best efforts" clause, the Fourth Circuit concluded that the parties intended that the Union would thereafter not be obligated to use all reasonable means to prevent and stop strikes in violation of the contract. In so concluding, the Fourth Circuit ignored the crucial fact that there was added to the Agreement in 1950, and included in every Agreement since that date, the clause requiring the parties to "maintain the integrity of the contract." It is Carbon's position, in line with the decisions of the Third Circuit, (Supra at p 29) and the view adopted by the Trial Court, that the language committing the Union to "maintain the integrity of the contract" necessarily imposes an all reasonable means obligation upon the Union.

Moreover, the complete and accurate bargaining history supports that construction. The complete and accurate collective bargaining history is set forth in *International Union UMWA*, (Boone County Coal Corp.), 117 NLRB 1095 (1957), the NLRB decision which the District of Columbia Circuit refused to enforce in *International Union* v. *NLRB, supra*. The bargaining history as therein set forth shows that as a result of the passage of

§ 301 of the Taft-Hartley Act, the Union insisted upon and got changes in the 1947 Agreement. Those changes were: (1) the rescission of all "no strike," "penalty" and "illegal suspension of work clauses" in prior agreements; *and* (2) inclusion of an "able and willing" clause. (See A. 147; 150 and *International Union, supra*, 117 NLRB at 1114.) The purpose of these 1947 changes was to relieve the Unions from damage liability for strikes. *Id.* The International wanted the "able and willing" language to assure that it would have no obligation to see that its members worked when they were willing to do so.[1] The operators found the above-stated provisions

[1]The D. C. Circuit erroneously characterized the "able and willing" language. It said:

> "The 'able and willing' clause, as the Panello decision shows, was intended to permit the International Union and its President, John L. Lewis, to adjust the production of coal to the depressed market by closing mines at his discretion. It seems to have no connection with the problem of 'no strike' and 'no stoppage' clauses." 257 F.2d at 216.

The *Panello* decision, cited by the D. C. Circuit (*Panello* v. *International Un UMWA* (89 F.Supp 935 (D.C. 1950), was an action under Section 10(j) of the Act for an injunction, pending formal adjudication by the Board of unfair labor practices filed by Southern Coal Producers, et al. against the International Union, for, among other things, insisting in negotiations for the 1950 agreement upon inclusion of the "able and willing" language. Those unfair labor practice cases were assigned numbers 5-CB-43, 5-CB-44, 5-CB-45, 5-CB-46, and 5-CB-47 before the National Labor Relations Board.

Those cases (Nos. 5-CB-43 through 47) were decided by the Board upon the basis of an unpublished Trial Examiner's Intermediate Report, issued in December, 1950, authored by the same Trial Examiner who heard and determined the case reviewed by the D.C. Circuit in *International Union* v. *NLRB, supra*, i.e., Arthur Leff. The pertinent portions of this unpublished opinion are reproduced in an appendix to this brief. Trial Examiner Leff, in deciding the case reviewed by the D.C. Circuit, relied upon and apparently took administrative notice of his findings in the earlier cases. See 117 NLRB at 1114, notes 20 and 21. His conclusions in Case No. 5-CB-43 through 47, adopted in the latter case, as to the purpose and intent of the "willing and able" clause, are contrary to the above-quoted conclusion of the D. C. Circuit. Specifically he held:

(1) That the sole intent and purpose of the inclusion of the "able and willing" language in the 1947 Agreement was to relieve the UMW of liability from strikes, because, among other reasons, it was interpreted by them to establish that "the purpose of the collective bargaining agreement was merely to provide a structure of employer-employee relations fixing the terms and conditions of employment while

(Footnote continued on next page)

of the 1947 Agreement unacceptable in practice, because, among other reasons, they tended to give rise to abuse in the form of wildcat strikes over grievances. Therefore, they insisted in negotiations for the 1950 Agreement upon changes "reimposing financial responsibility upon the Union and its members for wildcat strikes." *International Union supra,* 117 NLRB at 1114, 5, n. 21. As a result of those negotiations, the 1950 Agreement did not contain the "able and willing" language; and it added the "integrity" provisions as follows:

> "The United Mine Workers of America and the Operators * * * affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout. . . ." (A. 156, 57)

Retained in "MISCELLANEOUS" §3 of the 1950 Agreement, was the promise, first made in the 1947 Agreement, to settle all disputes through the grievance and arbitration machinery.

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employees worked; but that no obligation was imposed on them to work, *or upon the Union to have them do so, unless they were able and willing.*" *International Union, United Mine Workers of America (Southern Coal Producers Association)*, Cases No. 5-CB-43 through 47, unpublished Intermediate Report, Appendix to Brief, (AB) p. A-3. (Emphasis added)

(2) That prior to negotiations for the 1950 Agreement, UMWA and John L. Lewis interpreted and applied the language beyond its intent to permit the UMWA to control production in order to equalize work among the members.

(3) That the operators in the negotiations for the 1950 Agreement sought and obtained deletion of the "willing and able" language because they objected to its use for *either purpose.* See *International Union, United Mine Workers of America (Southern Coal Producers Association*, Cases No. 5-CB-43 through 47; unpublished Intermediate Report) AB p. A-4, 5.

Upon compliance with the Intermediate Report, the NLRB on August 10, 1951, dismissed cases No. 5-CB-43 through 47. The injunction rendered in *Pannello* was, of course, vacated, since its conclusions were *not* supported by the ultimate NLRB findings. Why the D. C. Circuit relied upon the vacated interlocutory decision, rather than the final decision in the case, is a mystery.

The Union found, during the term of the 1950 Agreement, that the "best efforts through available disciplinary measures" requirement was objectionable. However, their objection was not to the obligation to do *something* about wildcat strikes, but to the operator's contention that the language obligated them to use discipline in *all* instances. See *International Union, supra,* 117 NLRB at 1115, n. 22. Thus, in negotiations for the 1952 Agreement, the Union sought and obtained the delegation of the "best efforts through available disciplinary measures" language. The "able and willing" clause continued to be deleted, and the promise to "maintain the integrity of the contract" remained. As found by the Trial Examiner, whose findings were adopted by the National Labor Relations Board in the *International Union* case:

> "As for the deletion of the 'best efforts' clause, I think no greater significance should be attached to this than the reason, * * * [at p. 1115, n. 22] given by counsel at the hearing that it was because the Union did not want to be told by others what disciplinary action, if any, it must take against its own members to force them back to work. I think it more significant that the parties retained in the 1952 Amendments their covenant to 'maintain the integrity of the contract.' " 117 NLRB at 1118.

The "integrity" clause of the 1952 amendments was continued, without alteration, in the 1968 and 1971 contracts sued upon in this case.

Thus, a review of the complete and accurate collective bargaining history shows (1) that the "able and willing" language was deleted and the "maintain the integrity of the contract" provision inserted in the contract in 1950, on the insistance of the operators in an effort to remedy

the wildcat strike situation by reimposing financial responsibility upon the unions; (2) that the operative part of the "integrity" language, and the deletion of the "able and willing" language, was continued without change in the contracts sued upon here; and (3) that the "integrity" provision can have no meaning unless it means that the Unions are obligated to make efforts to prevent and end strikes in violation of the Agreement.

Moreover. even the District of Columbia Court of Appeals majority in *International Union* v. *NLRB, supra,* recognized that the "integrity" language alone, without any significance attached to the deletion of the "able and willing" language, must have such a meaning. It said:

> "It is of course fair to ask what the court thinks subdivision 3 of the 'Miscellaneous' article of the contract meant. We think it was, in effect, a 'gentlemen's agreement' that the desirable way to settle disputes was by the use of the grievance machinery; *that the responsible officials of the union hierarchy would do their best to see that that procedure was followed; that they would put such pressure as seemed to them to be wise and likely to be effective upon the members and the inferior echelons in the hierarchy to induce or coerce them to refrain from striking.*" 257 at F.2d at 218. (Emphasis added)

The D C. Circuit's majority conclusion that the no-strike obligation was, in essence, an illusory "gentlemen's agreement," is, of course, long dead and buried under an overwhelming number of contrary decisions including *Gateway Coal, supra.* Its conclusion that the collective bargaining history shows that the integrity language meant that the District and International have an obligation to take action to enforce the implied no-strike clause remains. In short, such an interpretation does

not, as indicated by the Fourth Circuit's decision, "rewrite the terms of the contract[s] upon which the parties agreed (P.A. at All.);" but is the only interpretation which is in accordance with the bargaining history.

CONCLUSION

The judgment of the Court of Appeals, insofar as it reversed the judgments against the District and International relating to the thirty-one strikes over arbitrable issues, should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX TO BRIEF OF CARBON FUEL COMPANY

Portions of Unpublished Intermediate Report of Trial Examiner Arthur Lett in Cases 5-CB-43 through 5-CB-47 Before the National Labor Relations Board.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 5-CB-43

In the Matter of

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, and JOHN L. LEWIS, its PRESIDENT

and

SOUTHERN COAL PRODUCERS ASSOCIATION
on behalf of coal operators represented by it

Case No. 5-CB-44

In the Matter of

UNITED MINE WORKERS OF AMERICA, and
JOHN L. LEWIS, its PRESIDENT

and

INDIANA COAL PRODUCERS ASSOCIATION, et al

Case No. 5-CB-45

In the Matter of

UNITED MINE WORKERS OF AMERICA, and
JOHN L. LEWIS, its PRESIDENT

and

H. C. FRICK COKE COMPANY, et al

Case No. 5-CB-46

In the Matter of

UNITED MINE WORKERS OF AMERICA, and JOHN L. LEWIS, PRESIDENT thereof

and

CENTRAL PENNSYLVANIA COAL PRODUCERS ASSOCIATION

In the Matter of

UNITED MINE WORKERS OF AMERICA, and JOHN L. LEWIS, its PRESIDENT

and

ARMCO STEEL CORPORATION, et al

* * *

36 **(c) Alleged insistence that collective bargaining agreements contain provisions such as the "able and willing" and memorial period clauses which, it is claimed, were intended and designed to permit the Union unilaterally to abrogate or suspend the collective bargaining contracts at any time, and to determine when union members will work, so that the agreements would not be binding on the Union or fix the terms and conditions of employment.**

Analysis requires determination of what objectives the clauses in question were intended and designed to accomplish; whether these objectives involved legitimate subjects for collective bargaining; and, if so, whether the Union's approach and bargaining position with regard to them were such as to constitute a refusal to bargain in good faith.

First: What were the purposes of the clauses and what issues were raised concerning them in the bargaining negotiations?

The original purpose of the memorial period clause does not appear to have been broader than a literal reading of it suggests. The "able and willing" clause was requested by the Union and agreed to by the Operators in the 1947 negotiations for the purpose of safeguarding the Union from damage suits based upon employee work stoppages during the term of the contract. It was designed to supplement the rescission, simultaneously agreed upon, of all "no-strike", "penalty" and "illegal suspension of work" clauses in prior contracts, so as to remove the possibility of there being read into the contract any implied contractual responsibility for work stoppages during its term. This it did by making clear in substance that the purpose of the collective bargaining agreement was merely to provide a structure of employer-employee relations fixing the terms and conditions of employment while employees worked; but that no obligation was imposed on them to work, or upon the Union to have them do so, unless they were able and willing.[24]

[24]This did not deprive the agreement of mutuality of obligation; for there was implicit in the agreement a promise by both parties not to seek during its term any change in the terms and conditions fixed by the contract to govern employer-employee relations while miners were actually employed. Moreover, the contract was enforceable at least with respect to executed transactions, thus differing from an understanding to which no legal effect can be given. The contractual freedom retained by the miners not to work unless able and willing was no less than the contractual freedom retained by the Operators not to operate their mines and provide employment unless they were able and willing to do so.

Cf. *J. I. Case* v. *N. L. R. B.*, 321 U. S. 332, 334, where the Supreme Court stated:

> Collective Bargaining between the employers and representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not,

(Footnote continued on next page)

37 Before the 1949 negotiations began, the Respondents placed the Operators on notice that, if written into the new agreement, the "able and willing" and memorial period clauses would also be interpreted in a manner not contemplated by the Operators when the clauses were originally negotiated, that is, as supplying a mechanism by which the Union during periods of over-production could allocate working time in the industry with the objectives of spreading work, equalizing employment opportunities, and generally promoting industrial stability. This was most clearly disclosed by Lewis in his speech at the Union's October 1948 convention. He there declared in substance that if the Union was still unable "to work out with the bituminous operators any kind of a nationally stabilized arrangement," the Union might find it necessary to exercise its "contractual right" to advise its members "how many days a week they need to work."

The Operators during the negotiations attacked the clauses in question along two fronts. First, they objected to the "able and willing" clause along with the omission of the "no-strike" and "penalty" and "illegal suspension of work" clauses, because, as they asserted, this had given rise to abuses in the form of numerous wildcat work stoppages over minor grievances. These abuses from wildcat strikes, they agreed, should be corrected

however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence by it alone. The negotiations between a union and management resulted in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules of service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. . ."

by reimposing financial responsibility upon the Union and its members for work stoppages, through restoration of the no-strike and penalty clauses and the elimination of the "willing and able" clause. Secondly, and more strenuously, they objected to the use by the Union of the "contractual options" under both the "able and willing" and memorial period clauses for the purpose of allocating working time. The Operators contended in substance that the control of mine facilities and the determination of when the mines would operate was a prerogative of management, and that it was the Union's responsibility to see to it that men were available for work while mines were running.

Thus, there were basically two issues raised at the bargaining conferences growing out of the clauses in question — (1) whether the new contract should continue to exculpate the Union from responsibility for work stoppages during the term of the contract, and (2) whether the new contract should contain "contractual options" which would permit the Union to call a cessation of work operations during certain days of the week or periods of the year with the objective of spreading working time, achieving equalization of employment opportunities for union members, and preventing unstable conditions in the industry. There was never any

38 intent indicated by the Respondents to utilize these clauses for the purposes of altering, modifying, or terminating during the contract term any of the fixed terms and conditions of the contract governing employment relations while the mines operated and the miners worked. As to these, indeed, the Union's representatives assured the Operators in the course of the negotiations that they, no less than the Operators, desired

a firm contract. It was never claimed by the Operators that these clauses might be used to justify strikes designed to modify fixed terms of the contract while the contract remained alive, and this was not involved in the controversy at all. To the extent, then, that the complaint alleges the clauses were intended and designed to permit the Union unilaterally to determine when union members will work, the complaint is found supported by the record. To the extent, however, that the complaint alleges the clauses were intended and designed to permit the Union to abrogate or suspend the contracts during the contract term — in the sense of changing, varying, or terminating fixed terms and conditions governing the employer-employee relations while the mines were operating and the men working — it is found to lack record support.

Second: Were the controverted objectives of the clauses such as to constitute legitimate subjects for collective bargaining?

We consider first the exculpatory objectives of the "able and willing" clause, designed to supplement the omission of "no-strike", "penalty" and "illegal suspension of work" clauses contained in contracts prior to 1947. Although the scheme of statutory collective bargaining contemplated by the Act envisages the reduction of strikes and industrial unrest, Congress nevertheless specifically reserved and protected the right of employees to strike and engage in concerted work stoppages, except in certain restricted circumstances not germane to this discussion. The right concertedly to desist from work is not, to be sure, an absolute one; it is one that may be waived or limited by contract. But whether it is to be waived or limited, and the obligation, if any, that a

union is to assume for itself and the employees to refrain from work stoppages during the term of a contract, and what sanctions, if any, should be imposed for breach of any obligation expressly or impliedly agreed upon, have long been considered appropriate subjects for collective bargaining. These are among the subjects that must be hammered out in the collective bargaining process by the negotiating parties themselves, according to their needs, their duties, and their bargaining strength, and not according to the Board's judgment of what may be best in the circumstances.

The amendments to the Act have wrought no change in this concept. Section 301, making unions as well as employers suable for breach of contract, presupposes a prior consentual arrangement, express or implied, for breach of which suit will lie. Although that section — as its legislative history shows — was designed in the interest of making collective bargaining contracts "equally binding and enforceable on both parties" by preventing unions from breaking agreements with "relative impunity,"[15] it may not fairly be read as creating a substantive regulation of the kind of bargain parties must be willing to embrace in order to establish good faith. Section 301 neither requires contracts to be executed for a fixed term nor prohibits parties from preserving in the contract the right to strike during its term. There is nothing in the language of that section to imply that Congress intended to do more than remove obstacles to the enforceability of contract terms by which the parties themselves had agreed to be bound. Other portions of the legislative history of Section 301 confirm this view. Thus, it specifically appears from the Senate Report that Con-

[15] Senate Report No. 105, 80th Cong., 1st Sess., pp. 15-17.

gress was aware that the omission of a no-strike
39 clause in a contract would provide a means of avoiding application of the section. Yet it allowed Section 302 to remain unchanged, stating (in the Senate Report) that its inclusion in the Act was still an "improvement" because the incorporation of a no-strike clause "is certainly a point to be bargained over."[26] What was said with regard to the bargainability of a no-strike clause would seem to have equal application to any contractual provision which has the effect of exculpating a union and employees from financial responsibility resulting from work stoppages during the contract term.[27]

Nor does Section 8 (d) — prohibiting strike action to "terminate or modify" a contract for 60 days after notice — require a different conclusion. Neither the language of that Section nor its legislative history suggests that it was designed to limit the right of parties freely to negotiate and fix by mutual agreement the private liabilities each is to incur toward the other under the collective bargaining contract. Section 8 (d), enacted in the public interest, has, it is true, the practical effect of superimposing on every contract in applicable situations a 60 day no-strike legal requirement, enforceable, in the event of a violation, through unfair labor practice proceedings and the deprivation of employee rights. But simply because that legal requirement and the right to seek its enforcement may not be bargained away, it does not follow that it must be written into every agreement as a minimum *contractual obligation* for breach of which

[26]Senate Report No. 105, 80th Cong., 1st Sess., p. 18.

[27]See, Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, at pp. 283, 303-312 for an illuminating discussion of the question whether a union's insistence upon a grant of financial immunity constitutes an unfair labor practice under Section 8 (b) (3) of the Act. Professor Cox concludes that it does not.

civil damages may be assessed. In any event, Section 8 (d) is inapposite. That Section, it must be emphasized, is restricted by its terms to strikes to *modify* or *terminate* the terms and conditions of an existing contract. As has been noted, neither the "able and willing" nor the memorial period clause had as their objectives the modification or termination of established terms and conditions of employment, which, although made applicable under the "able and willing" clause only while employees worked, were to govern relations for the length of the contract's duration. The Operators in the bargaining conferences never contended otherwise, and as to that no issue was ever raised. What the Operators were complaining of was that the "able and willing" clause had unduly encouraged wildcat work stoppages over alleged grievances, and that both it and the memorial period clause were being interpreted so as to permit work stoppages which would have the effect of achieving production controls. But work stoppages of the kind complained of, *if permitted by a contract*, can scarcely be said to be in violation of it, or for the purpose of modifying or terminating it.

In finding as I do that the Union's exculpatory objective under the "able and willing" clause constituted a legitimate subject for collective bargaining, I do not mean to imply that a union's insistence upon the exclusion of no-strike and the inclusion of exculpatory provisions may under no circumstances be considered as evidence of bad faith bargaining. Such insistence when found coupled with other evidence — for example, evidence of a fixed purpose to refrain from entering into *any* bilateral contract or of a purpose to circumvent restrictions of the Act — may be considered in determining

that there was a bad faith approach to the collective bargaining process.[20] But, standing alone, and absent such other evidence, I do not believe that even an insistent position on a subject Congress had indicated "is certainly a point to be bargained over" is enough to prove illegality.

* * *

[20]Cf. *Chicago Typographical Union*, 80 NLRB No. 116.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY, *Petitioner*,

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; and LOCAL UNIONS NOS. 6572, 7626 and 2236, UNITED MINE WORKERS OF AMERICA, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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OCTOBER TERM, 1978

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CARBON FUEL COMPANY, *Petitioner*,

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UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; and LOCAL UNIONS NOS. 6572, 7626 and 2236, UNITED MINE WORKERS OF AMERICA, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

I. QUESTIONS PRESENTED

1. Do the collective bargaining agreements between the coal industry and the United Mine Workers of America impose upon the latter an implied duty to discipline local union members, the "breach" of which renders the UMWA liable in damages for their wildcat strikes?[1]

---

[1] The casting of the issue in terms of "reasonable steps" or "best efforts" to prevent or end strikes, as it is repeatedly characterized by Petitioner and the *Amici* supporting it, is inaccurate and misleading, inasmuch as those parties do not point to any specific steps which either the International or the District should have taken other than invoking disciplinary procedures. See pp. 40-41, *infra*.

2. Is the implication of such a duty consonant with the national labor policy favoring free collective bargaining and demanding non-interference by employers in internal union affairs?

II. STATEMENT

This action was brought by Petitioner Carbon Fuel Company ("Carbon") against the International, United Mine Workers of America, its District 17 and three of its Local Unions as a result of approximately 48 work stoppages which occurred in the years 1969 through 1973 at Carbon's coal mines in West Virginia. Inasmuch as this case involves the liability of the International Union and its District 17, they will be referred to hereinafter as "UMWA" unless the context denotes otherwise; and the entire United Mine Workers of America organization will be referred to hereinafter as the "Union." The only requested relief still pertinent is the demand by Carbon for damages. Jurisdiction was based upon Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185 (A. 4).[2]

Carbon is a coal producer, which operates approximately 15 mines primarily in Kanawha and Boone Counties, West Virginia (A. 19-21). In 1969-1973, it produced an average of about 2,200,000 tons of coal annually (A. 23). It is a member of the Bituminous Coal Operators Association which is a national association of coal producers that acts as their principal bargaining agent in negotiations with the UMWA (A. 20, 27-28).

The Union is a three-tiered organization, consisting of approximately 1,300 Local Unions, 23 Districts, and the International Union. The main function of the International Union is to negotiate national coal wage agreements (A. 28). The Districts negotiate memoranda of understanding with coal companies relating to seniority, holidays and working conditions, and handle grievances which are not settled at the local level.[3] The Locals elect their own officers and conduct the day-to-day affairs of the Union at each mine.

The UMWA has no role in the hiring of miners. Men desiring work approach the coal company directly; there is no hiring hall arrangement in the coal industry. Once a miner is hired, he becomes a member of the Union (A. 40-42).

1. The Practice of the United Mine Workers of America Concerning "Wildcat" Strikes.

Each of the work stoppages involved was what is commonly known as a "wildcat" strike. Insofar as is relevant to the issues before this Court, the germane facts were essentially undisputed. None of the stoppages was called, supported or condoned by the UMWA (A. 46-47). Nor was the UMWA involved in the planning of, or otherwise a participant in, the stoppages; nor did it ratify any of the stoppages (A. 44-45). The role of the UMWA[4] with respect to these stoppages was as follows:

When a wildcat strike occurred, the offices of District 17 would be advised by telephone by the Kanawha Coal Operators Association, and by the Local Union, usually on the

[2] The Appendix hereinafter will be referred to as "A." The trial transcript will be referred to as "Tr."

[3] A description of the Union's structure and the role of its various levels appears in *Hodgson* v. *UMWA*, 344 F. Supp. 17, 20 (D.D.C. 1972), and *Hodgson* v. *UMWA*, 344 F. Supp. 990, 993-994 (D.D.C. 1972), *affirmed sub nom, Brennan* v. *UMWA*, 475 F.2d 1293 (D.C. Cir. 1973). District 17 alone has approximately 101 Local Unions (A. 72).

[4] For a substantial part of the period involved, District 17 was under a trusteeship of the International Union.

day that the stoppage occurred (A. 98-99). The District would confer by telephone with officers of the Local, to determine whether they believed that they could persuade the miners to return to work promptly. If it was considered that they could not, or their efforts were not successful, the District sent a representative to meet with the miners (A. 64-7, 76, 78, 80, 84, 85, 89, 103, 108).

At those meetings, the District representative would seek to ascertain the cause of the stoppage, so that it could be taken up with management. He also invariably would order the miners back to work, informing them that the strike was unauthorized, and against Union policy. The miners also were informed that the continuation of the strike could result in the issuance of injunctions by the courts, of possible contempt citations, and possible discipline (A. 82, 86, 99, 104, 116). When the underlying dispute could be submitted to the grievance procedure under existing collective bargaining agreements, the miners were so advised (A. 78, 104, 110).

In most cases, this process resulted in the prompt return of the miners to work. In 22 of the 32 strikes (69%) now in issue,[5] the strike lasted only 1 to 2 days. If the strike did not end after the first meeting, it was the standard practice for the District Representative to call another meeting with the miners and again order them back to work; and to repeat this process daily until the strike could be

[5] Those stoppages which were "sympathy strikes" were not actionable under the ruling in *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976), as the Court below held. 582 F.2d at 1348. There were 16 such strikes; there is apparently a mathematical error in the opinion below. *Ibid.* Data concerning the strikes are summarized in Exhibit "A" to the Brief of Respondents in the Court of Appeals, which in turn is based on data in Tr. 233-304. The miners were working in three shifts each day and each "day" in the above figures equals three shifts rather than a calendar day.

brought to an end. In 30 of the 32 occasions at issue, the strike ended in no more than 4 days. The remaining 2 strikes lasted 5 or 6 days each. UMWA President Miller and the District 17 Presidents testified that the long-standing Union position, conveyed to its members, was that wildcat strikes were detrimental to the interests of the Union, the miners and the public and that ending them was their "first priority" (A. 66, 90, 117-120, 126).[6] The UMWA efforts to terminate these strikes were in good faith; no evidence to the contrary was presented at trial.

Likewise, Carbon presented no evidence to support its basic factual theory and assertion that instituting disciplinary proceedings would bring aggrieved coal miners back to work faster than the practices the UMWA does follow, or avoid strikes, in ways which neither the employer's own disciplinary powers, nor the contempt powers of the Courts, could accomplish. To the contrary, several UMWA witnesses, on the basis of long experience in coal mining, testified that any such attempt by the International to impose discipline would be counterproductive and aggravate wildcat strike situations (A. 79, 87, 93, 116, 117, 120). UMWA President Miller testified that in his own experience, on an occasion in the 1950's, the International had threatened to revoke the charter of the UMWA Local of which he was a member, because of a wildcat strike the International was told by the local members that it was free to take the charter. In these circumstances the membership was inflamed and the strike proved to be a protracted one (A. 119-120).[7]

[6] Within the memory of a long-time President of District 17, on only one occasion did a District Representative fail to comply strictly with this procedure. He was fired (A. 70).

[7] A recent study for a Congressional agency provides a unique insight into the causes of long-standing labor-management unrest in the coal fields, including wildcat strikes. U. S. Congress, Office of Technology Assessment, *The Direct Use Of Coal* (1979). Four

2. The Collective Bargaining Agreements and Their History.

Union liability for wildcat strikes has been a specific subject of bargaining between the UMWA International and the coal industry. Two principal types of clauses are pertinent: those related to settlement of disputes without strikes, and those related to the parties' taking disciplinary measures against those who violated the contract. The bargaining history features deliberate deletions of both no-strike clauses and clauses concerning the use of "best efforts" through disciplinary measures, and successive readoptions of contract language which excluded any such express obligations.

Prior to 1947, the agreements contained express and rather broad no-strike obligations.[8] That language was ex-

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factors are principally responsible: long-term economic conditions in the coal market including extended periods of demand stagnation; the unique nature of the underground work place and the work process itself; the social environment in the coal fields; and "the past", attitudes which each new generation of miners learns from the previous generation. *Id.* at 127-29, 135-36, 145, 396. The report concludes that wildcat strikes "have always been a part of coal mining and may never be eliminated . . . Harsh legal penalties against strikers do not seem to deter wildcat strikes in this industry." *Id.* at 22.

Dix, *Work Relations in the Coal Industry, The Hand-Loading Era, 1880-1930* (Institute for Labor Studies, West Virginia University—1977), concludes:

> "The local work stoppage, so common in the industry today, can be traced back to the efforts of mine workers to protect their autonomy and their incomes even before the turn of the century."

Id., 569.

[8] In pertinent part the pre-1947 contracts read as follows:

Illegal Suspension of Work

A strike or stoppage of work on the part of the Mine

cised by the parties "to remove the danger that the union might be sued for breach of contract under the new statute [the Taft-Hartley Act]." *International Union, UMWA* v. *NLRB,* 257 F.2d 211, 216 (D.C. Cir. 1958). Since 1947, there have been no express no-strike obligations in any agreement, including the 1968 and 1971 agreements which were in effect when the wildcat strikes involved in this case occurred. Both before and after 1947, and to the present, the agreements have provided for the amicable resolution of disputes through a grievance procedure. (A. 137, 141-42, 145, 148-49, 154-55, 166-67, 170-71, 175-76, 182-83.

Especially significant in this case, in which the coal industry is attempting to have the Courts create a union duty to discipline, is the bargaining history directed precisely to disciplinary provisions. In the 1950 agreement only, there was a provision for both parties, the UMWA and the industry, "to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement." 257 F.2d at 216. This language was eliminated (and the related clauses amended) in 1952, "because it laid [the UMWA] open to criticism for the measures which they took, or did not take, in disciplining locals or members who engaged in unauthorized stoppages." *Id.* at 216-17. In 1952 and thereafter, the agreements have contained the following Section (A. 160):

> Workers shall be a violation of this Agreement. Under no circumstances shall the Operator discuss the matter under dispute with the Mine Committee or any representative of the United Mine Workers of America during suspension of work in violation of this Agreement.

(A. 137, 142).

> "The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" Section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the Industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the Courts."

The judicial decisions which followed most closely upon the adoption of this language, against the backdrop of this bargaining history, squarely rejected industry contentions that the UMWA could be held liable for unauthorized wildcat strikes. *E.g., United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872, 877-78 (4th Cir. 1955), *cert. denied,* 350 U.S. 847 (1955); *Lewis* v. *Benedict Coal Corp.,* 259 F.2d 346, 351 (6th Cir. 1958), *affirmed in part by evenly divided court,* and *modified in part on other grounds,* 361 U.S. 459 (1960); *cf. International Union, UMWA* v. *NLRB,* 257 F.2d 211 (D.C. Cir. 1958).

In the light of both the bargaining history and these judicial determinations of non-liability, the industry and the UMWA repeatedly re-adopted without change the relevant clauses as they had been revised in 1952. *See* A. 161-162 (1955 Agreement); A. 162-163 (1956 Agreement); A. 163-164 (1958 Agreement); A. 165 (1964 Agreement); A. 168-169 (1966 Agreement); A. 178 (1968 Agreement); and A. 179, 186-187 (1971 Agreement).

III. PROCEEDINGS BELOW

At trial, the evidence showed, without serious dispute, that District 17 and the International had not started,

condoned, supported or ratified the work stoppages in question, and had tried to stop them, with considerable success. The stoppages occurred for a great variety of reasons, some subject to grievance procedures, and others not: to register support of black lung and coal mine safety legislation; to protest discharge of a fellow employee; to complain of misconduct by a foreman, or unsafe working conditions, or the failure to post jobs fairly; to protest the ousting of Anthony Boyle as UMWA President; and to complain about the administration of the Welfare Fund.

The Union also attempted to present a defense that Carbon, as a matter of deliberate company policy, would not process grievances at the first two of the five contractual steps at the mine site, thereby forcing any miner who wished to pursue issues of safety or job rights to proceed to the District level; and that to the extent settlements were made at the first two steps, Carbon refused to honor them. Although the UMWA was permitted to argue that in particular disputes Carbon had refused to process grievances, it was not permitted to argue that the grievance procedure was not invoked because of the general policy of Carbon's frustrating and impeding the grievance machinery (Tr. 743, 1077-1083).

After denying the Defendants' motion for a directed verdict, the District Court instructed the jury, *inter alia,* that the International and the District could be liable "[i]f you find from a preponderance of the evidence that the International and District Unions did not use all of the reasonable means available to them to prevent work stoppages or strikes from occurring in violation of the contract, or to terminate any such work stoppages or strikes after they began . . ." (A. 197).

It further instructed the jury that the District and International could be held liable for work stoppages engaged

in by the local unions "while they were acting as agents for District 17 and/or the International, either within the scope of their authority . . ." (A. 197-198). The District Court's instructions added that such agency could be established by "indirect or circumstantial evidence," and then pointed out Carbon's contention that the International Union and District 17 "through their contract and Constitution made the local unions their agents for purposes of settling arbitrable disputes" (A. 198). It was added (A. 198-199) that "a union is not responsible for the acts of an agent which are performed directly contrary to orders or directions given the agent unless the union knows the agent is or has been performing those acts and does not reasonably act to prevent the agent from performing them."

As noted, the only evidence produced at trial on which these instructions, given over the Defendants' objections (*see, e.g.,* A. 201-202), purported to be based, was to the effect that unauthorized strikes had occurred; the practice of the UMWA was to call meetings and order the men back to work as described above; and that the only action identified by Carbon which the UMWA did not take was that it did not discipline its members or revoke the charters of locals. As the instructions implied, the only evidence pointed to by Carbon as supposedly raising a question of whether locals acted as "agents" for the UMWA in wildcat strikes was that the International negotiated the collective bargaining agreements, and that the first two steps of the grievance procedure provided in those agreements were at the local level.

The jury returned verdicts totaling $206,547.80 against the International, $242,130.80 against District 17; and $722,347.43 against the three local unions.

The Court of Appeals for the Fourth Circuit affirmed the judgments against the Local Unions, and reversed those against District 17 and the International. 582 F.2d 1346.

The Court ruled that the locals could be held liable for the "mass action" of their members. However, as to the 16 of the 48 stoppages at issue, which were over matters not subject to the grievance procedure, such as "sympathy strikes," the judgments were reversed on the authority of *Buffalo Forge* v. *United Steelworkers,* 428 U.S. 397 (1976). The holdings as to the liability of the local unions, and the liability for strikes over non-grievable matters, have not been brought before this Court by the respective parties.

With respect to the District and International, the Fourth Circuit adhered to its long-standing precedent in *United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872 (4th Cir. 1955), *cert. denied,* 350 U.S. 847 (1955), that such entities could not be held liable for wildcat strikes which they did not start, adopt, encourage or prolong. The Fourth Circuit noted (582 F.2d at 1350) that *Haislip* was in accord with the weight of authority, and that the recent contrary position suggested in decisions of the Third Circuit,[9] "in effect, rewrites the terms of the contract upon which the parties had agreed."

IV. SUMMARY OF ARGUMENT

I. It would violate and frustrate the plain intention of the parties for the Court to graft onto their Agreements an implied duty of the UMWA to discipline individual members or local unions that engage in wildcat strikes or to be liable in damages for such strikes. The parties' intention that their contract include no such duty or obligation is demonstrated by the bargaining history. In the 1950 contract, the UMWA and the coal industry agreed "to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent

[9] *Eazor Express, Inc.* v. *International Brotherhood of Teamsters,* 520 F.2d 951 (3rd Cir. 1975); *Republic Steel Corp.* v. *United Mine Workers of America,* 570 F.2d 467 (3rd Cir. 1978).

stoppages of work by strike or lockout pending" the processing of grievances (A. 156-157). In the 1952 amendment to that agreement and in every agreement thereafter, including the 1968 and 1971 agreements involved in this case, the parties limited their commitment by providing only "that they will maintain the integrity of this contract," but deleting the "best efforts" and use of "disciplinary measures" language and thereby eliminating those obligations. The parties' deliberate excision of this language is probative of their intention and agreement not to impose upon the UMWA the liability and duties which the industry is seeking in this case.

When the parties engaged in collective bargaining and executed successive collective bargaining agreements after 1952, including the 1968 and 1971 agreements, they could have had no doubt as to the correct legal interpretation of the pertinent contract language. The Courts had interpreted that language to denote that the UMWA was not liable for stoppages it did not authorize or ratify, and in which it in no way participated (*e.g., United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872 (4th Cir. 1955) *cert. denied*, 350 U.S. 847 (1955); *Lewis* v. *Benedict Coal Corp.*, 259 F.2d 346, 351 (6th Cir. 1958), *aff'd in part by evenly divided court and modified in part, on other grounds*, 361 U.S. 459 (1960).[10]

In the light of this conduct by the parties and the contract language to which they have agreed, it would offend normal rules of contract construction to grant the industry

[10] The issue on which this Court divided equally in *Benedict* was whether the absence of a no-strike clause by itself precluded liability for strikes called by the International Union in violation of the provision of the collective bargaining agreement in force from 1950 to 1952, requiring settlement of local disputes through the grievance procedure. The Sixth Circuit's holding that the International is not liable for "wildcat" strikes it did not call was not challenged in this Court.

rights which it did not win in collective bargaining, but rather knowingly and repeatedly surrendered. Indeed, the industry is in fact requesting this Court to superimpose upon the agreements a liability and discipline provision, tantamount to a guarantee against strikes, far broader in scope and more onerous to the UMWA than any provision previously existing between these parties.

II. The national labor policy founded on free collective bargaining likewise commends rejection of Petitioner's attempts to strengthen itself and weaken the UMWA. Such judicial tilting of the scales of relative bargaining strength is proscribed by the many legislative and judicial declarations that the law requires and protects the rights of employees to enjoy the benefits of free collective bargaining by strong and democratic unions which they may join and support. The national labor policy militates against wholesale and improper extensions of union liability or intrusions into internal union affairs at the behest of the employer. That policy sustains the agreements as made and intended by the parties, and forbids Government dictation or addition of terms to the agreements. *E.g., H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970).

Long-established policies would be violated if Carbon's position prevailed. The law clearly establishes the separate existence of members and different labor organizations, locals, districts and internationals, all from each other. Automatic imposition of liability upon the UMWA for the wildcat strikes of members and locals, which the industry here seeks, is thus proscribed.

The UMWA has a general policy against wildcat strikes. They have been denounced and the UMWA not only withholds its authorization, ratification or any support from them but also actively seeks to terminate them when they occur. Active efforts at persuading the employees to return to work have generally been effective. In view of this gen-

eral policy of the UMWA as well as its actions directed against these particular strikes, holding the UMWA liable would be contrary to applicable agency principles.

To require the UMWA to discipline would be an unwarranted intrusion in its internal affairs and would upset the existing balance of bargaining strengths in the coal industry by seriously weakening the UMWA. The concern that such internal union decisions be free of trespass by the employer is demonstrated by the fact that methods for enforcing no-strike clauses are a discretionary, not mandatory, subject of bargaining.

This Court has recently reiterated the concern of the national labor policy that labor organizations not be subjected to new, heavy types of financial liabilities, lest they be rendered incapable of representing the employees effectively. *International Brotherhood of Electrical Workers* v. *Foust*, — U.S. —, 99 S. Ct. 2121 (1979). Moreover, the mandatory discipline which the industry wishes to impose upon the UMWA would sow internal disputes and divisions, loosening if not destroying the bonds of loyalty and confidence which the members have in the UMWA.

In our society, voluntary associations and labor organizations in particular cannot operate by military discipline. To the contrary, democratic rights and processes are assured union members by virtue of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401 et seq. The discipline of any union member must accord with due process requirements under that Act and therefore cannot proceed with the dispatch required to terminate wildcat strikes. There is no reason to believe that discipline of members by the UMWA would be more effective than discipline of employees by the industry, which the industry has apparently eschewed on its own judgment of its own best interest. At the trial Carbon introduced no evidence

that imposing a disciplinary duty upon the UMWA would aid in preventing or terminating wildcat strikes.

If the industry can persuade this Court to deprive the UMWA of the same control over its internal affairs and reactions to wildcat strikes which the industry has and will retain for itself, the unity and strength of the UMWA will be grievously injured. The industry would have received by implication rights comparable to if not broader than those which it did have included in an Agreement decades ago, but which it knowingly bargained away. The industry would have received from the Government a rich advantage in bargaining power in defiance of the national labor policy. This Court should not countenance any such result. Rather, to enforce the Agreements as intended by the parties and in the promotion of that policy, this Court should affirm.

V. ARGUMENT

1. THE COLLECTIVE BARGAINING AGREEMENTS PRECLUDE THE IMPOSITION OF LIABILITY FOR WILDCAT STRIKES UPON THE UMWA FOR FAILURE TO DISCIPLINE MEMBERS OR LOCALS WHO ENGAGE IN WILDCAT STRIKES.

A. The Terms and History of the Pertinent Clauses Preclude the Imposition of Liability or the Implication of a Duty to Discipline.

(1.) The Parties' Intention Not to Impose a Duty of Discipline is Demonstrated by Their Including it in the 1950 Agreement, but Excising that Language in 1952 and Readopting the 1952 Language in Every Agreement Thereafter.

The terms and history of the pertinent clauses of the 1968 and 1971 collective bargaining agreements preclude the imposition upon the UMWA of an implied duty to institute in internal disciplinary proceedings against locals or members who engage in wildcat strikes. The best evidence of the parties' intention is the fact that the 1950 agreement did include a provision that both parties would "exercise

their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in the agreement"; and the parties excluded this language in 1952 and continued to exclude it from every successive agreement, including the 1968 and 1971 agreements pertinent to this case.

By eliminating that language, the parties plainly meant to exclude that duty from the obligations which both parties had previously assumed. The deletion of that language denoted that henceforth neither party would be obligated to discipline anyone who engaged in a stoppage of work, whether by strike or lockout, pending dispute and grievance processing according to the contract.

It would defy the realities of collective bargaining and rewrite history to brand this conduct of the parties as meaningless. The plain truth is that these experienced and sophisticated parties bargained hard with respect to this language and knew precisely what they were doing in 1950 and 1952, and each agreement thereafter. In 1950, they provided in the conjunctive that they intended "to maintain the integrity of this contract *and* to exercise their best efforts through disciplinary measures to prevent stoppages of work" (A. 156-157; emphasis added). Obviously, the contracting parties regarded these as two separate duties, neither being expressed or implied by the other and thus neither gaining legal force without its own express incorporation in the contract. That refutes Carbon's assertions that the parties envisioned that a duty to discipline would or could be implicit in the "maintain the integrity" language.

The deliberate incorporation of the "disciplinary measures" language in 1950 underscores the dispositive significance of its deliberate excision in 1952 and thereafter. To appreciate the significance of the deletion of this language one need only imagine how Carbon would have mobilized it in this litigation had it still appeared in the contract. In short, it is utterly inconceivable that the parties intended to engage or did engage in a series of futile negotiations and agreements with respect to this language, especially the twin futility of incorporating this language in 1950 and then excising it in 1952.

The deliberate excision of a term is to be given effect under settled rules of contract construction. *See, e.g., Royal Indem. Co.* v. *John F. Cawrse Lumber Co.*, 245 F. Supp. 707, 711 (D. Ore. 1965); *Tondevold* v. *Blaine School Dist.*, 91 Wash.2d 632, 590 P.2d 1268, 1270 (1979):

> "The contract between the parties here contained a mandatory retirement provision, . . . When the contract was renegotiated, that provision was not included. The trial court's unchallenged finding of fact was that the BEA had asked the district to delete such a provision and the district's representatives complied. The history of these negotiations compels the conclusion that the parties knowingly abandoned the policy of mandatory retirement."

Also *cf. Klein* v. *Republic Steel Corp.*, 435 F.2d 762, 765-66 (3rd Cir. 1970) ("It is a canon of statutory construction that where as here the words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning").

The parties never intended that the "maintain the integrity of this contract" language could carry with it by implication the particular duty to discipline those violating the contract which they had expressly included as a separate and discreet obligation in an earlier contract.[11] That lan-

[11] Other portions of the relevant contract clause show that certainly the parties never intended that any such duty could be imposed as an automatic obligation upon the International Union in every wildcat strike or series of strikes throughout the nation.

guage is not thus deprived of significance. It expresses, for example, the intention of the parties to refrain from actions which might frustrate or undermine the grievance procedures of the contract, such as, by not participating in them with a good faith desire to settle disputes as constructively and expeditiously as possible. A duty to refrain from certain actions is scarcely to be interpreted as an affirmative obligation to undertake other actions. Again, the parties were not engaging in wasteful bargaining or futile agreements. They intended to express different objectives by the two conjunctive clauses when they included both; and they intended and agreed to exclude the one calling for a duty to discipline when they did exclude it in a series of subsequent agreements.

(2) The Parties' Deletion of Express No-Strike and Related Clauses Confirms Their Intention Not to Impose Liability Upon the UMWA for Wildcat Strikes.

The parties' deletion of previously existing no-strike clauses in contemplation of the Taft-Hartley Act in 1947 further reflects their intention strictly to limit any UMWA liability for wildcat strikes, and further explains why the inclusion of very explicit language was considered a prerequisite to the creation of any duty to discipline in the 1950 negotiations. In 1947, the coal industry and the

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For casting the claimed duty so broadly, as the industry is now urging this Court, may be to categorize the disputes and claims of liability and disciplinary duty by the International as "national in character" and therefore not subject to the grievance procedures commencing at the individual or local level, but only to "free collective bargaining . . . without recourse to the courts." At the very least, this language reflects the intentions of the parties that if and when a perceived problem arose, orderly collective bargaining rather than litigation would be the only means for imposing any obligation or duty upon the International grounded on principles applicable nationwide. cf. *Lewis* v. *Benedict Coal Corp.*, 259 F.2d 346, 351 (6th Cir. 1958), *aff'd in part by evenly divided Court and modified in part, on other grounds,* 361 U.S. 459 (1960).

UMWA engaged in collective bargaining for a new national agreement and the Taft-Hartley Act which was about to take effect was very much in their minds. See *International Union, UMWA* v. *NLRB, supra,* 257 F.2d at 216-17. There can be no question that they were in agreement that the liabilities and obligations of the UMWA with respect to strikes should be curtailed and eliminated so far as possible.

The keystone provisions embodying this general intention were repeals of previously existing no-strike and related clauses: "Any and all provisions in [previous national agreements] containing any 'no-strike' or 'penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void." A. 150 (1947); A. 152 (1950); A. 178 (1968); A. 186 (1971).

To be sure, some decisions have held that a no-strike obligation is to be implied under certain circumstances, *E.g., Gateway Coal Co.* v. *UMWA,* 414 U.S. 368 (1974)[12]; *Lewis* v. *Benedict Coal Corp.,* 259 F.2d 346, 351 (6th Cir. 1958), *aff'd in part by evenly divided Court and modified in part, on other grounds,* 361 U.S. 459 (1960). But *Benedict* and other cases following it explain clearly why the propriety of implying a no-strike clause does not support imposing upon a union by implication the kind of obligation claimed by Carbon to exist here.[13] As *Benedict* explained, the abrogation of an express no-strike provision was not rendered meaningless by implying a no-strike obligation with respect to disputes the parties agreed would be set-

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[12] In *Gateway,* unlike this case, the UMWA supported the actions taken at the local level.

[13] Generally, "a provision should not be found by 'implication' when the testimony convincingly shows that such a provision was intentionally omitted. . . ." 3 *Corbin on Contracts* 298 (1960); *Gluckman* v. *Holzman,* 53 A.2d 246, 249 (Del. Ch. 1947).

tled in the grievance process, precisely because the abrogation still served the purpose of insuring that the International "remained free from liability for spontaneous or 'wildcat' strikes" 259 F.2d at 351. As similarly stated in *Old Ben Coal Corp.* v. *Local 1487, UMWA,* 457 F.2d 162, 164-165 (7th Cir 1972):

> "Implying a no-strike obligation in the 1968 agreement does not render the express abrogation of previous no-strike clauses meaningless as then-Circuit Judge Stewart indicated in [*Benedict*]. By virtue of that language, the Union has preserved the right to strike with respect to all disputes not subject to settlement by other methods made exclusive by the agreement. *In addition the language protects the Union from liability for spontaneous or 'wildcat' strikes . . .*" (emphasis added).

Accordingly, the parties' intention is clearly established: The UMWA is not to be liable for wildcat strikes; and in particular it has no obligation to discipline strikers.

B. The Parties Incorporated in Their Successive Agreements After These Contract Changes Judicial Gloss that There Was No UMWA Liability for Wildcat Strikes Nor Any Implied Duty to Discipline.

In their successive negotiations, the parties were not in the dark as to how Courts would interpret the pertinent language in their collective agreements. Within a few years of the foregoing fundamental changes in contract language, and against the background of the bargaining history recounted above, several appellate decisions confirmed that the UMWA indeed was *not* liable for unauthorized local stoppages. There was no suggestion that any duty to engage in discipline bound either party, and in particular no

apparent conception or contention that liability could be based on failure to take disciplinary action.

In the 1955 decision of the Fourth Circuit which that Court relied upon in the decision below, *United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872, 877 (4th Cir. 1955), *cert. denied,* 350 U.S. 847 (1955), the holding was:

> "There is nothing in the contract making defendants liable for 'wildcat' strikes or requiring that they take any action with regard to them. This court has pointed out that employees who engage in 'wildcat' strikes lose the protection of the [National Labor Relations Act] and may be discharged by their employers with impunity for so doing. *N.L.R.B.* v. *Draper Corporation,* 4 Cir., 145 F.2d 199, 156 A.L.R. 989. We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do; and there manifestly is no such liability."

In 1958, interpreting the Agreement even as it existed from 1950 to 1952, the Sixth Circuit reasoned that in light of "the express abrogation of a no-strike clause in the 1950-52 agreement," the UMWA "remained free from liability for spontaneous or 'wildcat' strikes." *Lewis* v. *Benedict Coal Corp., supra,* 259 F.2d at 351. Likewise, in 1958, the District of Columbia Circuit also approved the construction of the bargaining history urged above. *International Union, UMWA* v. *NLRB, supra,* 257 F.2d at 216-17.[14]

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[14] The penury of Carbon's argument on the bargaining history is revealed by its sole reliance (Carbon Br. 30-35) upon an NLRB decision (117 N.L.R.B. 1095) which was overturned by the Court of

Similarly, a decision current at the time of the 1971 negotiations held that in light of the bargaining history, UMWA contracts cannot "be read as imposing liability upon the International Union for spontaneous or wildcat strikes in which it had no part by way of causing or prolonging such strikes." *Blue Diamond Coal Co.* v. *UMWA*, 436 F.2d 551, 556 (6th Cir. 1970), *cert. denied*, 402 U.S. 930 (1971).[15]

Consequently, the parties were very far indeed from writing on a clean legal slate when they negotiated and executed the 1968 and 1971 agreements. Quite to the contrary, they were then fully aware that courts had interpreted the contract language as changed in 1947 and 1952, and reiterated to identical effect in every agreement thereafter. The parties well knew that the courts had interpreted the language, against the background of deliberate deletion of prior language which imposed broader no-strike obligations and specifically established a duty to discipline, as freeing the UMWA from liability for local wildcat strikes. As these contract terms were repeatedly readopted thereafter, and as they stood in the 1968 and 1971 Agreements, the intention of the parties was embodied in that language, and correspondingly the legal force of that language, carried with it this judicial gloss. "Like other contracts, it [a collectively bargained agreement] must be read as a whole and in the light of the law relating to it when made." *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 279 (1956).

The law relating to the 1968 and 1971 Agreements when they were made plainly rejected UMWA liability for wildcat strikes. Even if areasonable argument could have been made in 1952 that a duty upon the UMWA to invoke disciplinary measures existed in the general

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Appeals, 257 F.2d 211, and which does not even support it on the pertinent issue. The very trial examiner's Intermediate Report in that case upon which Carbon relies (Br. 31, n. 1), see 117 NLRB 1094, 1099 (1957) reflects acceptance of the following explanation by UMWA counsel of the 1952 deletion of the "best efforts" clause (*id.* at 1115, n. 22):

> ". . . [A] lot of people want to use their own judgment as to what is the best effort that a representative of the Union, or an officer is, and those people are the ones that are in opposition to the Union and . . . they think that the way to solve these things is to put the men out of the Union, or to take away all the rights they have. The Union doesn't think that that's the proper thing to do, and they think, as a matter of fact, that it is a most ridiculous thing to get them back to work, because they would lose whatever control or power of persuasion that they have.
>
> "Maybe operators think that if they can get them out of the Union and they get them back under their prerogative, so to speak, so they can fire them, or throw them out, or throw them out of their company houses, or do whatever they wish to, they can beat them back to work and that may be the best thing for them. The Union is not going to do that, and when they wrote the 'best efforts' clause in there they weren't undertaking to do anything like that, and that is why it was taken out in 1952."

The Report stated (*id.* at 1118) that the deletion of the clause is significant to the extent that "the Union did not want to be told by others of the disciplinary action, if any, it must take against its own members to force them back to work." In short, the Trial Examiner's Report supports the UMWA rather than industry on the subject of whether any duty to discipline arises from the agreements at issue.

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[15] Indeed, the *Haislip-Benedict* application of the Agreements was faithfully followed by the Courts of Appeals until a very recent apparent departure by the Third Circuit in *United States Steel Corp.* v. *UMWA*, 534 F.2d 1063, *rehearing denied*, 534 F.2d 1084 (3rd Cir. 1976). *See, e.g., North American Coal Corp.* v. *Local 2262, UMWA*, 497 F.2d 459 (6th Cir. 1974); *Peabody Coal Co.* v. *Local 1734, UMWA*, 543 F.2d 10 (6th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); *cf. Old Ben Coal Corp.* v. *Local 1487, UMWA*, 457 F.2d 162, 164-65 (7th Cir. 1972).

"settlement of disputes" and "integrity of contracts" terms—and we submit that it could not, even then—it would dislodge the parties' intention and arbitrarily rewrite the contracts to accept any such contention over a score of years later, after the parties had reiterated their adoptions of the language in full view of the contrary judicial constructions.

> "But even if, as an original matter the language of the disputes clause might have been susceptible of the interpretation urged by the Government, the restrictive meaning of the words 'arising under this contract' had long since been established when these parties used them in 1953. The question before us is what the parties intended, not whether the construction on which they relied was erroneous." *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 407 (1966).

What the parties intended is that neither should have any duty to discipline for contract violations, and that in particular the UMWA should not have any liability for wildcat strikes. That is the only conclusion sanctioned by the pertinent contract language and its judicial interpretation, and the bargaining conduct of the parties.

C. Carbon Would Have This Court Grant It by Implication a Guarantee Against Wildcat Strikes Which It Did Not and Could Not Have Won in Collective Bargaining.

The bargaining history refutes Carbon's position that a duty to discipline should be implied as a facet of the parties' intention in the 1968 and 1971 agreements. It demonstrates that the parties recognized that their agreement upon any such duty, when they had actually reached it, must be spelled out in the contract.

In addition, Carbon's position is so unabashedly bold and extreme that its acceptance would leave Carbon a

wider range of actions against the Union, when the collective agreements have deliberately omitted and repudiated any indemnity, best efforts, or disciplinary action provisions, than an employer whose agreements included circumscribed clauses of this character, for example, requiring the Union to indemnify the employer in some instances for damages due to wildcat strikes. A great variety of "no-strike," "indemnity" and similar clauses, of varying breadth, have existed from time to time in collective bargaining agreements. Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv.L.Rev. 274, 306-08 (1948). The narrowing of such clauses, or their omission, is a device, of which "[t]here can be little doubt of the effectiveness . . . of guarding a union against a potentially crushing liability." *Id.* at 309. The Senate Committee considering what became the Taft-Hartley Act indeed viewed the inclusion of even a no-strike clause as "a point to be bargained over." S. Rep. No. 105, 80th Cong., 1st Sess. 18 (1947); Cox, *supra*, at 309. Carbon would invert this reasoning, and by implication alone afford management the broadest conceivable rights, and place upon the UMWA the most onerous duty, precisely where no-strike clauses were deleted entirely and other clauses were greatly narrowed. This is patently impermissible. There is "no basis in the statutory policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table." *Scofield* v. *NLRB*, 394 U.S. 423, 433 (1969).

2. THE FUNDAMENTAL OBJECTIVE OF THE NATIONAL LABOR POLICY, FREE COLLECTIVE BARGAINING, IS SERVED BY THE DECISION BELOW AND WOULD BE FRUSTRATED BY REVERSAL OF THAT DECISION.

A. The Fundamental Objective of the National Labor Policy is Free Collective Bargaining Between Strong and Democratic Unions and Employers, Each Party Independent of Internal Interference from the Other.

Free collective bargaining is the fundamental national labor policy. Terms and conditions of employment and production where workers are organized are to be established and administered by collective bargaining, and not by the dictate of the employer or the Government. For the most part, each of the parties to collective bargaining, the management and the union as collective spokesman for the employees, is free to organize and operate independently and take whatever action is necessary in its own interest; the national labor policy is to qualify this freedom only so far as is necessary to regulate particular practices perceived to be abuses and to maintain fairness and rough equality of the relative potential strength of the parties.

This labor policy has been declared and enforced in our law at least since the adoption in 1935 of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. §§ 151 *et seq.* ("NLRA"). The very purpose of that Act was to further the organization of employees so that labor could be a stronger party, independent of employer interference, to collective bargaining. To be sure, a hoped-for result was a mitigation of labor disputes and work stoppages. That result was to be achieved not by outlawing of such disputes and stoppages, but by eliminating the causes: the denial of "the right of employees to organize"; the refusal "to accept the procedure of collective bargaining"; the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." 29 U.S.C. § 151. The means adopted by the Congress, the purpose and policy of the Act, was "restoring equality of bargaining power between employers and employees" and "encouraging the practice and procedure of collective bargaining. . . ." *Ibid.* This policy was basically reiterated

when Congress amended the Act in the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. §§ 141 *et seq.* ("LMRA"), which was essentially directed against certain union practices relating to the employment relationship; this was adjudged helpful to the basic policy of free collective bargaining, which was reaffirmed. *E.g., American Ship Building Co.* v. *NLRB,* 380 U.S. 300, 316-17 (1965); *Local 24, IBT* v. *Oliver,* 358 U.S. 283, 295-96 (1959). The Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. §§ 401 *et seq.* ("LMRDA"), directed against certain union practices vis-a-vis individual members, likewise reiterated that collective bargaining is the basic labor policy. 29 U.S.C. § 401(a).

The "fundamental premise" upon which our labor legislation is based is "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99, 108 (1970). In the NLRA Congress "recognized from the beginning that agreement might in some cases be impossible." *Id.* at 103. And in 1947 Congress added Section 8(d) to the NLRA expressly declaring that the statutory duty of bargaining collectively "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d); *NLRB* v. *American Nat'l Ins. Co.,* 343 U.S. 395, 402-04 (1952).

B. Requiring the Union to Discipline Its Members and Locals, and Subject Itself to Liability for Wildcat Strikes Would Contravene the National Labor Policy by Weakening the Union, and Tilting the Bargaining Advantage Towards the Industry, in Contravention of Well-Established Legal Principles.

In the service of the national labor policy of free collective bargaining, the law must be and has been sensitive

to avoid unwarranted weakening of either of the bargaining parties. In particular, both Congress and the Courts have been scrupulous to avoid financial debilitation of unions as the collective representative of individual employees by extensions of union liability.

1. Imposing Liability by Implication Upon the UMWA Disregards Long-Established Legal Principles Strictly Limiting the Circumstances Under Which International Unions May be Held Liable for Conduct of Their Members or Locals.

The rule of automatic UMWA liability for wildcat strikes, for which Carbon and the industry are contending in this case, disregards the clear distinction between parent unions on the one hand, and local unions and the membership on the other hand, which the law has long recognized and preserved. There is no automatic liability on the part of the parent unions for the activity of the members or locals any more than there is automatic liability for a parent corporation for the wrongs committed by its subsidiaries. Zealously have the Courts and the Congress preserved this distinction.

Over a half-century ago, in *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922), this Court declared that a parent union is not vicariously liable for the alleged wrongdoing of local bodies absent actual ratification or authorization of that wrongdoing, and that the general power of the parent to discipline local organizations does not support vicarious liability. The *Coronado* rule has been followed faithfully. *E.g., North American Coal Corp* v. *Local 2262, UMWA*, 497 F.2d 459, 466-67 (6th Cir. 1974):

> "It has been clear to Congress for many years that imposition upon unions of vicarious liability for the unauthorized acts of individuals could easily mean the elimination of labor unions as a social institution in America . . .
>
> "Irresponsible or violent acts by individual workers (or by agents provocateur) if automatically attributable to the union on the scene could, of course, serve to destroy it. But such vicarious liability is repugnant to due process of law. And this circuit has repeatedly recognized that unions may only be held responsible for authorized or ratified actions of [their] officers and agents. . . .
>
> "In each of these cases this court recognized that *where a union did not call, authorize, or encourage a strike, and, on the contrary employed its authority to oppose it, no liability for an unauthorized or wildcat strike could be attributed to the union.*" (emphasis added; footnotes omitted).

Accord, W. L. Mead, Inc. v. *International Brotherhood of Teamsters*, 126 F.Supp. 466 (D. Mass. 1954), *aff'd*, 230 F.2d 576, 584 (1st Cir. 1956) (duty of union was "not to call a strike"), *cert. dismissed*, 352 U.S. 802 (1956); *United Construction Workers* v. *Haislip Baking Co., supra.* The National Labor Relations Board also has recognized that:

> "The overwhelming weight of judicial authority, including the Supreme Court of the United States, is that a local union is a legal entity apart from its international and that it is not a mere branch or arm of the latter . . . . That, too, has been the position of the Board . . . ." *Franklin Elec. Constr. Coop.*, 121 NLRB 143, 145-46 (1958).

Congress first acted to insure against automatic imputation of liability for acts of members or locals upon the parent union in the 1932 Norris-LaGuardia Act, 47 Stat.

70, 29 U.S.C. §§ 101 *et seq.* Section 6 of the Act, 29 U.S.C. § 106, required "clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof," before a labor organization could be held liable for the acts of individual officers, members or agents. The "driving force" behind its adoption was "the fact that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control." *UMWA* v. *Gibbs,* 383 U.S. 715, 736-37 (1966).

The standards of the Norris-LaGuardia Act were "more stringent" than those of "ordinary doctrines of agency." *Id.* Congress elected to move the standards to general agency principles in 1947, when the Labor-Management Relations Act, 29 U.S.C. §§ 141 *et seq.,* became law. Section 301(b) and (e) of that Act provided that a labor organization "shall be bound by the acts of its agents" and that "in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. §§ 185(b), (e). The Congressional intention was to "apply the ordinary rules of the law of agency to labor organizations." *Haislip, supra,* 223 F.2d at 879.[16]

[16] One commentator, in characterizing the *Haislip* decision as "sound" stated as follows:

> "As a matter of good sense, there are very sound reasons for a narrow concept of union liability. The union bargains for all employees in an appropriate unit, but it does not necessarily have the loyalty of all employees. Even in a union shop, the willingness to follow union leadership on economic questions, as well as matters of discipline of individual employees, may be of varying degrees and intensity. The union may not even be in a position to discipline employees who are nonmembers. And it is somewhat extreme to hold the union liable for damages when it takes a position opposite to that taken by the striking employees and does not encourage the strike."

Gould, *The Status of Unauthorized and "Wildcat" Strikes Under The National Labor Relations Act,* 52 Corn.L.Q. 672, 701-02 (1967).

Although the House Bill, as passed, would have abolished the Norris-LaGuardia Act including Section 6, in Section 301 suits,[17] the conferees rejected that approach in favor of the present Section 301. See H. Conf. Rept. No. 510, on H.R. 3020, p. 66; also 93 Cong. Rec. 6603 (1947) (Sen. Taft) ("The conferees . . . rejected the repeal of the Norris-LaGuardia Act"). Senator Taft noted (93 Cong. Rec. 6680) that "All this proviso does is to determine the question whether an agent of a labor union should have applied to him the ordinary common law rule of agency" and that the decision in *Carpenters* v. *United States,* 330 U.S. 395 (1947), "apparently led to the conclusion that a man who was clearly an agent under all rules of agency was yet not considered an agent of a labor organization." Senator Taft also stated that Section 301 merely imposed on a union "the same responsibility that a corporation has which is engaged in business." 93 Cong. Rec. 7690 (1947). He rejected as unjustified by the text of the bill and its background the *in terrorem* arguments of opponents of the bill that it could bring broad liability to international unions for action of local union representatives. 93 Cong. Rec. 7000 (1947).[18]

[17] H.R. 3020, § 302(e), 80th Cong., 1st Sess.; 1 Legislative History of the Labor Management Relations Act, 1947, p. 222 (GPO 1948).

[18] Two opponents of the Taft-Hartley Act, Senator Kilgore and Pepper, expressed fears in the debates on the conference version of the bill that the "agency" provision of § 301 might allow an

As Professor Cox noted in a leading contemporaneous article on the subject:

> ". . . it is clear that [Section 301 does] not impose on labor unions a responsibility beyond that imposed by the normal rules of agency . . . Consequently, just as a corporation ordinarily is not liable for the acts of a stockholder, so recognition of a labor organization as a juristic personality prevents imposing liability on it for the acts of its members.
>
> ". . . in dealing with local affairs, including local strikes and boycotts, a local union ordinarily acts a separate entity in pursuit of its own affairs."

Cox, *Some Aspects of the Labor-Management Relations Act,* 1947, 61 Harv.L.Rev. 274, 310, 312 (1948). Professor Cox noted that at the hearings, "Senator Taft took the

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international union to be sued "for something done by one of its local union representatives" and that such actions "might wreck the entire treasury" of the international. 93 Cong. Rec. 6680, 6681, 6689 (June 6, 1947).

A few days later, Senator Taft stated, in response, that "in the course of the debate on the conference agreement on H.R. 3020 a number of arguments directed at specific provisions of the bill were made on the floor which were not justified by either the text of the bill or the background of statutes and decisions against which it was written. In addition, numerous completely erroneous statements were made with respect to the effect of certain portions of the bill." 93 Cong. Rec. 7000 (June 12, 1947). To correct these statements, Senator Taft submitted a "supplementary Analysis of Labor Bill as Passed", which noted that the bill "restores the law of agency as it has been developed at common law", and noted the intent to avoid the result of the *Carpenters* majority. With respect to agency provisions of § 301, the referenced "erroneous statements" in the debates, could only have been those of Senators Kilgore and Pepper concerning potential expansive liability of international unions.

position that an international union would ordinarily not be liable for a wildcat strike by a local union." *Id.* at 312.[19]

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[19] A colloquy between Senator Taft and Mr. Patterson, General Counsel for the Rubber Workers Union, which took place in the 1947 hearings provides a unique insight into the application of the ordinary rules of agency of § 301(e) to the question of the "responsibility" of an international union for an unauthorized strike participated in by one of its locals. Mr. Patterson began the colloquy by relating an incident where the international union was being held responsible for clearly unauthorized strikes of the local union although, in an almost identical factual pattern to the *Haislip* case, a representative of the parent union had directed the local members to return to work and had disavowed the strike.

> "CHAIRMAN: [Senator Taft] In such a case as you describe, Mr. Patterson, you would be better off with this Act because it says here "any labor organization . . . shall be bound by the acts of its duly authorized agents acting within the scope of their authority from the said labor organization."
>
> MR. PATTERSON: Oh, no. We would not, Senator.
>
> THE CHAIRMAN: Under that, it seems to me you could not be liable in the case you have just put.
>
> MR. PATTERSON: I do not think that would save us in this situation at all, because an agent or a representative may be acting within the apparent scope of his authority and yet directly contrary to what the international officers told him. True, we did not fire him but firing a representative after we have a suit on our hands is not going to do us much good.
>
> THE CHAIRMAN: Well, I should think though that is mainly a matter of ordinary law. I do not see how you could be liable in any such case, nor how any bill could make you liable where your subordinate organization acted contrarily to your direction as you have expressed the situation.
>
> That would be like an agency case involving selling where someone who is holding himself out as having authority whereas, he did not have that authority. I would think that you are safe enough.

Hearings on S. No. 55, Sen. Labor and Public Welfare Comm., 80th Cong., 1st Sess. p. 1539, 1544, 1550-51 (1947).

Accordingly, the Congressional purpose was to focus attention, not merely upon whether the "specific act" was authorized or ratified, but also whether that class of acts *generally* was authorized or ratified. The legislative test thus shines the spotlight upon the general condemnation of the UMWA of striking over matters which might be submitted to the contractual disputes settlement procedure and its actions generally directed to end such strikes. That is even more probative than its disavowals of, and refusal to authorize or ratify, these strikes.

In the UMWA, the calling of a strike is *not* within the usual duties of local union members or officers, and cannot be said to be within the scope of their authority, or in the furtherance of the UMWA's interests—the usual tests of vicarious liability.[20] Rather, it is a function reserved to the International (*see* A. 121, 188-93). And, far from such prohibited actions "furthering" some interest of the UMWA, its own policy statements note that "[u]nauthorized strikes cause unnecessary loss of earnings to our members, work hardship upon their families and are not beneficial to the interests of the communities wherein they occur" (A. 190), and otherwise damage the Union. This general UMWA position was acted upon in this case. Each of the stoppages here was promptly disavowed by the UMWA which bent its efforts to having the strikers return to work. On this record, the conduct of the wildcat strikers cannot be vicariously attributed to the UMWA conformably to the applicable law.

[20] Indeed, it is farfetched to view the local members or officials as acting as "agents" of the International in any sense when they simply walk off the job. The Third Circuit's recent "imputed" liability decisions have been justly criticized as a departure from usual agency rules. *Note*, 89 Harv.L.Rev. 601, 607-10 (1976).

2. Extending Liability Beyond Those Who are Participating in (or Authorizing or Ratifying) the Strike and Not Mobilizing the Grievance Procedure Would be Unjust and Would Discourage the Adoption or Continuation of Arbitration Procedures in the Coal Industry.

Inasmuch as the UMWA neither participated in, authorized nor ratified the strikes which are accordingly "wildcat" strikes, there is no justification for imposing liability on it; and any such imposition would discourage the incorporation of arbitration clauses in the coal industry and similar collective bargaining relationships. The purpose of requiring and encouraging resort to the contract grievance procedure rather than strikes is served by the present remedies available to the employer of discipline, injunction or other legal action addressed precisely to those who are striking and their Locals to the extent they are involved.[21]

To extend that remedy beyond those who have made the election of striking rather than resort to the grievance procedure is patently unfair. This is not an area for guilt by association. To the eye of the law, as we have seen, the International and the Districts are different legal entities and personalities from the locals and the members.[22] It is

[21] The Court below held the local unions liable on a theory that the "mass action" of its members is attributable automatically to the local. 582 F.2d at 1349-50. The correctness of that holding is not before this Court. However, the UMWA considers that "mass action" is a legally insufficient basis for imputing the actions of individuals to a local union; and reserves the right to bring it before this Court at the appropriate time.

[22] *E.g., United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, 878 (4th Cir. 1955), *cert. denied*, 350 U.S. 847 (1955); *Isbrandtsen Co.* v. *Nat'l Marine Engineers*, 9 F.R.D. 541, 544 (S.D.N.Y. 1940); Cox, *Some Aspects of the Labor-Management Relations Act*, 1947, 61 Harv.L.Rev. 274, 310, 312 (1948). This distinction also was followed in *U. S. Steel Corp.* v. *UMWA*, 598 F.2d

not the membership of the International or the District which has adopted the course of wildcat strikes in lieu of contractual disputes settlement procedure; it is only particular employees of Carbon. If the locals are to be held by the concept of the "mass action" of their members, that holding must be confined to the mass of membership involved. There is no justification for extending the finding of contract violation for liability in damages to the far broader groups of membership represented by the District and the International.

To subject the UMWA to liability without justification would inevitably discourage the adoption of grievance

363, 367 (5th Cir. 1979). There the Fifth Circuit held, correctly in our view, that "to succeed the Company would have to show that the District or International in some way also made itself a party to the strike"; *Id.* at 366, and that the Company had not shown "that either the District or International exercises such all-pervasive control over the local that the acts of the local may be imputed to the parent entity." *Id.* at 367. However, its opinion also contains *dicta*, unsupported by discussion, that "evidence of a past pattern of illegal strikes throughout the International membership is probative of complicity in this illegal conduct," and in a sympathy strike situation "where the International or District's greater ability to communicate with and control *both* sets of participants would suggest extending responsibility to the larger union entity." *Id.*

These *dicta* overlook the facts and legal considerations set forth in this Brief. There is no legal basis for allowing a trier to infer UMWA "complicity" from the mere existence of wildcat strikes, which result from deep-seated social causes beyond the UMWA's control. *See*, p. 5, n. 7, *supra*. Legal liability cannot be founded upon a bare assertion that its imposition would serve some useful purpose, even if that were true. Merely to assume that holding the UMWA liable would serve the purpose of stopping and preventing such strikes disregards not only the realities of wildcat strikes but also the decisive legal principles, grounded upon the agreements bargained and executed by the parties in historical fact and upon the general labor policy calling for the enforcement of such agreements, that preclude such liability.

settlement and arbitration procedures in collective bargaining agreements. Obviously, the UMWA would bend every effort and ounce of bargaining strength to obtain contract language which would rid itself of this liability, as indeed it believed it had done in the past. As a general matter, moreover, international unions would be inhibited from including arbitration clauses in their agreements, particularly in the case of bargaining units which are geographically extensive or multi-employee in which the membership is inherently difficult to control.[23]

There is no need to augment the remedies available to Carbon. As against the locals, as this case illustrates, Carbon remains free to invoke legal proceedings. As against the individual strikers, moreover, if Carbon genuinely believes that its employees are engaging in an illegal strike, it may discipline them. See, *Haislip, supra,* 223 F.2d at 877. For various reasons of its own interest it sometimes chooses not to do so: It may recognize, for example, that its own supervisors bear responsibility for the strikes; or in any event, it may not wish to subject itself to the kind of reaction which may ensue in the local community as well as the work force. Its concern for the loyalty and morale of the employees, or whatever reasons it has for eschewing disciplining its employees, only highlight its

[23] Federal labor policies favor multi-employer bargaining. *NLRB* v. *Brown,* 380 U.S. 278, 289 (1965); *NLRB* v. *Teamsters Local 449* (*Buffalo Linen*), 353 U.S. 87, 95 (1957); "Multi-employer Association Bargaining And Its Impact On The Collective Bargaining Process," Report of the General Subcommittee on Labor of the House Committee on Education and Labor (Committee Print, 1965). Such units are favored because they facilitate more efficient and meaningful negotiations and produce better contracts more effectively administered, thereby reducing contract strikes. To make automatic liability and discipline requirements the price the bargaining parent union must pay for such contracts, as the coal industry would like, is to subvert these policies.

desire in this case to gain bargaining strength by weakening the UMWA.

3. Holding the UMWA Liable for Wildcat Strikes Would Seriously Impair the Union's Ability to Represent the Employees Effectively.

The adoption of the ostensibly simple tests that the UMWA must take all "reasonable" steps or extend its "best efforts" to prevent wildcat strikes is to make the UMWA the guarantor of all industry losses from wildcat strikes. That is indeed the tenor of the Briefs for Carbon and its *amici*, their pervasive insistence that the UMWA should be held liable for all wildcat strikes. It is significant that the verdicts in this case which Carbon and the industry are seeking to reinstate inflict damages from the commencement of the strikes. That could rationally be done only on the theory that the UMWA is liable for failing to prevent these strikes.

If the industry prevails, there will be no case of a wildcat strike in which the UMWA will be free of potential liability. The utter vagueness and generality of the proffered standards will virtually insure that the industry will contend that the very occurrence or continuation of the strike *ipso facto* establishes liability.

The industry presumably believes that it will never be precluded from a large verdict, even if prior cases should result in exculpation of the UMWA for the identical actions or demonstrate the utter impracticability and ineffectiveness of whatever additional steps industry counsel could concoct. From the industry point of view, the great new benefit of these standards is that the UMWA will ever be on the defensive.

The only certainty, if this rule is adopted, is that the UMWA will be sued in every case of a wildcat strike and,

judging by this case, that substantial verdicts will be entered. The only "evidence" of the alleged absence of "best efforts" in this case was the bare fact that only disavowal and persuasive means were used, and discipline was not invoked, and that the strikes ended in a short time, usually within a day or two.

This Court has recently reiterated that the law and national labor policy establish that opening new gates to holding unions financially liable "could impair the financial stability of unions and unsettle the careful balance of individual and collective interests." *International Brotherhood of Electrical Workers* v. *Foust*, —— U.S. ——, ——, 99 S. Ct. 2121, 2126 (1979). Although under some circumstances unions might be immunized from liability for a clear breach of the duty of fair representation by the *Foust* decision, that consideration is "insufficient to risk endangering the financial stability" of unions and "compromising the collective interests of union members in protecting limited funds." *Id.* at 2126-27. Like the allegations of liability involved in those cases, subjecting the UMWA to the award of damages contested for in this case "could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have." *Id.* at 2127. The very "threat of punitive damages could disrupt the responsible decisionmaking essential to peaceful labor relations." *Id.*

Identically, the threat of damages for wildcat strikes which the UMWA neither participated in nor authorized or ratified in any way not only could, but also inevitably would, disrupt the responsible decisionmaking and actions which the UMWA has actually undertaken in combatting such strikes.

4. Requiring the UMWA to Discipline Wildcat Strikers Would be Ineffective to End Such Strikes and Would be an Unwarranted Industry Intrusion in the Internal Affairs of the Union Upsetting the Balance Established by Existing Law.

Manifestly, the national labor policy of free collective bargaining assumes that there will be conflicting interests which are to be accomodated by the bargaining, different interests which are to be respectively served and promoted by each side independently of the other. There can be no genuine collective bargaining if the employer is free to dominate or interfere with the internal affairs of the union.

The basic policy that unions should be free from employer dictation of their internal rules and procedures has its clearest legislative expression in the NLRA's prohibition against employer dominance or interference with the formation *or administration* of any labor organization. 29 U.S.C. § 158(a)(2); *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938).

The effort of the coal industry to dictate that disciplinary proceedings must be triggered by wildcat strikes, as an implied duty under contract language which expresses no such obligation, is all the more outrageous an attempt to circumvent this policy because the law would preclude the industry's insisting that the UMWA even bargain on the subject. The duty to bargain collectively extends to "the relationship between the employer and the employee" and does not extend to those matters dealing "only with the relations between the employees and their union." *NLRB* v. *Wooster Division, Borg-Warner Corp.*, 356 U.S. 342,

350 (1958).[24] Consequently, provisions designed to obtain enforcement of no-strike obligations are permissive subjects of bargaining. While a no-strike clause is itself a mandatory subject of bargaining, the employer may not insist that there be bargaining or agreement on particular means of enforcement such as indemnity clauses or guarantees.[25]

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[24] Carbon relies on Section 204(a)(1) of the LMRA, 29 U.S.C. § 174(a)(1), to support its claim of UMWA responsibility. That Section which appears in Title II of the Act, creating and defining the role of the Federal Mediation and Conciliation Service, merely reflects the legislative policy favoring good faith collective bargaining as a means of solving labor disputes. *See NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956;) *OCAW, Local 4-447* v. *American Cyanamid Co.*, 94 LRRM 3064, 3065 (E.D.La. 1976) (not officially reported). House Conference Report No. 510 on H.R. 5020 (1947) describes the purpose of § 204, as follows:

> "Section 204 of the Senate amendment stated that it should be the duty of employers and employees, and their representatives, to exert every reasonable effort to settle their differences by collective bargaining, and, if this should fail, to utilize the assistance of the Mediation Service. This provision is also included in section 204 of the conference agreement, but there has been omitted therefrom language which appeared in the Senate amendment which indicated that the parties were under a duty to submit grievance disputes to arbitration."

Carbon's effort to invoke this extremely general provision having a purpose not related to the matters at issue here, in aid of its contention that a specific duty to discipline union members inheres in the collective bargaining agreements in the coal industry, is baseless. In any event the parties went far beyond any requirement of § 174(a)(1) in this regard, by bargaining over the matter of their responsibility, or lack of it, to discipline. See pp. 15-25, *Supra.*

[25] In *Borg-Warner*, this Court held that "recognition" or "ballot" clauses are permissive subjects of bargaining because they regulate the relations between the employee and the union. Following that rationale, the National Labor Relations Board has held that employer demands for union processes to secure the performance of no-strike clauses are permissive subjects of bargaining

If such vague but all-embracing standards as "reasonable steps" or "best efforts" are decreed as the industry demands, how can the UMWA possibly know in advance how to satisfy them? There is no way, as the industry is well aware. But it has a particularly insidious answer, which appears to be the stakes for which it is playing in this case, that the failure of the UMWA to take disciplinary action against individual members or local unions who are engaging in wildcat strikes will in effect be an irrebuttable presumption that the tests have not been satisfied and that the UMWA is liable. This most clearly emerges in the Brief of Bituminous Coal Operators' Association, Inc., as *Amicus Curiae* in Support of the Position of Carbon Fuel Company ("BCOA Br."). That Brief sets out the industry's position as to what further action the UMWA allegedly could have taken to defeat liability in this case for strikes which it disavowed and took all steps which it regarded as reasonable and effective to terminate. The industry reply is that in this case "the evidence also showed that neither the International, District 17, nor any of the Local Unions took any disciplinary action or other steps to prevent or end the strikes." (BCOA Br. 11). An accompanying footnote refers to the provisions under the UMWA Constitution for discipline of local unions and individual members. *Id.* at n. 4. That footnote continues to be refer-

—whether in the form of either indemnity bonds, *Carpenter's District Council of Detroit (Excello Drywall Co.)*, 145 NLRB 663 (1963), *enf'd* 58 LRRM 2064 (D.C. Cir. 1964), unsecured indemnity agreements, *NLRB* v. *Davison*, 318 F.2d 550 (4th Cir. 1963) *enf'g sub. nom. Arlington Asphalt Co.*, 136 NLRB 742 (1962); *Hall Tank Company*, 214 NLRB 995 (1974), or even liquidated damages, *Beyerl Chevrolet, Inc.*, 221 NLRB 710 (1975). This is true, even though, as the Board has recognized, the no-strike clause and an additional agreement to secure its performance are undoubtedly " 'entwined.' " *NLRB* v. *American Compress Warehouse*, 350 F.2d 365, 369 (1965), *enf'ing* 144 NLRB 433, 438 (1963), *cert. denied*, 382 U.S. 982. (1966)

enced for statements that the International and the Districts "have utterly failed and refused to exercise their authority to utilize *any* of the means available to them", *id.* at 21 n. 10 (emphasis added), that there is "an array of legitimate methods at the Union's disposal", *id.* at 39, n. 35, and, in reiteration, that the UMWA has the authority to impose sanctions upon wildcat striking locals and members, *id.* at 45, n. 40.

The industry would presumably have this Court believe that imposing this duty to discipline would eliminate wildcat strikes. In fact, it would not; and in any event, it is alien to the national labor policy that free collective bargaining, not authoritarian practices, in the long run will better preserve industrial peace as well as the other values of a free society.

At the trial, Carbon presented no evidence—doubtless because it had none—that invoking disciplinary proceedings would have prevented or shortened any of these strikes. Nor does the industry proffer any evidence or factual support for the implicit assumptions that imposing this duty on the UMWA would preclude or foreshorten wildcat strikes. On the other hand, the record in this case evidences that disciplinary measures are counterproductive. They breed such resentment that they are far more apt to harden attitudes and prolong a strike, or make it inevitable as a show of independence, than to curtail or prevent it. The industry insists upon its freedom and discretion to determine in every case whether to discipline employees, but it desires to straightjacket that discretion and freedom for the other side of the bargaining table, the UMWA.

The industry position is not only unfair but also unrealistic. The employer-employee relationship is inherently authoritarian and undemocratic. Contrastingly, a voluntary membership organization such as the UMWA is not,

in our society, a rigid, authoritarian institution with iron control over its members. To the contrary, the aim of public policy with respect to labor organizations, as embodied principally in the LMRDA, is to insure that labor organizations not be authoritarian; that democratic opposition be allowed to develop within them; and that discipline not be inflicted upon members without cause or without following procedures which provide due process. As is well documented, these goals indeed have been advanced in the United Mine Workers of America, after a long and difficult struggle, and autocratic leadership has been replaced through the electoral process. See generally, *Yablonski* v. *UMWA*. 466 F.2d 424 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 918 (1973); *Hodgson* v. *UMWA*, 344 F. Supp. 990 (D.D.C. 1972), *affirmed sub nom; Brennan* v. *UMWA*, 475 F.2d 1293 (D.C. Cir. 1973); *cf., Trbovich* v. *UMWA*, 404 U.S. 528 (1972).

A concomitant of this increased democratization is that, by statute, a union cannot impose summary discipline upon alleged participants in wildcat strikes. Rather, discipline must be preceded by the making of specific charges, time to prepare a defense, and a full and fair hearing. 29 U.S.C. §411(a)(5). And the proceedings must conform to the Union's own rules, which require not only procedural safeguards at the trial level and prescribe several steps of appeal (UMWA Constitution, Article III, Section 3, Pl. Ex. 34), but which also demand proof "that any member or members were engaged in promoting, conducting or prolonging an unauthorized work stoppage" (International Executive Board Policy Directive, A. 189). In this respect, industry's "rendition of federal labor policy is simplistic and, in major respects, flatly wrong", for it "assumes that unions have plain authority to revoke membership, impose fines, suspend local officials, prevent employment elsewhere and otherwise punish wildcatters."

Whitman, *Wildcat Strikes: The Union's Narrowing Path to Rectitude*, 50 Ind.L.J. 472, 480 (1975).

There is thus no support for the factual assumption necessary to the industry's position that invocation of the disciplinary means at the disposal of the UMWA and the District would be more effective than either the persuasive methods it does use with considerable success or the employer's and the Court's powers to act much more summarily. Invocation of Union discipline is no panacea for eliminating wildcat strikes. See N. 7 pp. 5-6, *supra*.

Beyond doubt, imposing a flat requirement that the UMWA must discipline members and locals who are engaged in wildcat strikes would generate discord among the membership and inevitably diminish the bargaining power of the UMWA. The very institution and enforcement of such adversary proceedings would import discord and disunity, pitting members against members, and locals against the districts and the UMWA. There are bound to be disagreements, for example, as to whether or not the stoppages are justified and whether they are illegal.[26] The industry's position would foment litigation. It would result in innumerable damage suits brought by employers against the UMWA, during or after labor disputes which "would only tend to aggravate industrial strife and delay an early resolution of the difficulties between the employer and union." *See, Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 248 (1970). Moreover, the industry position would spawn suits under the LMRDA, or based upon alleged

[26] This case itself illustrates the mischievous effects that would attend such a rule, for if the rule had been in effect prior to these strikes, Carbon would surely have contended that the UMWA and its Districts were absolutely bound to institute disciplinary proceedings against workers and locals who were engaging in what ultimately were held to be lawful strikes under *Buffalo Forge* and the decision below.

breach of the duty of fair representation, by members against unions. *See,* Whitman, *Wildcat Strikes: The Unions Narrowing Path to Rectitude,* 50 Ind.L.J. 472, 482-87 (1975).

Particularly since the automatic invocation of discipline might well be perceived as imposed at the behest and for the benefit of the industry, the confidence of the members that the Union can effectively serve their interests would be impaired. The highly visible result is that the Union no longer possesses a significant measure of its former freedom and discretion to act in their interests. The employer's position that the UMWA should be compelled to discipline them overstates the efficacy of such actions, as discussed above; and, more seriously, permits the employer to sow seeds of dissension between the Union and its members, and to exacerbate factionalism within the Union. See *Note,* 89 Harv.L.Rev. 601, 607-08 (1976); Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act,* 52 Corn.L.Q. 672, 702 (1967).[27]

> "A strict 'all reasonable means' standard deprives union leadership of flexibility to adjust to the political dynamics of a wildcat strike. The union should be allowed to judge whether severe sanctions will help bring the walkout to an end, or whether they would be counterproductive. Especially since wildcat strikes often are directed as much against the union leadership as against the employer, a union compelled to take drastic steps may lose is credibility with the wildcatters, and its further attempts to end the walkouts would be rendered ineffective. Similarly, administration of harsh disciplinary measures may execerbate factionalism within the union, thus undercutting support for the union leadership. Without this support, which is necessary to the scheme of exclusive representation, industrial stability may be threatened." Note, 89 Harv.L.Rev. 601, 607-608 (1976) (footnotes omitted).

[27] As Gould points out:

> "Furthermore, there may be groups within the unit which are hostile to the bargaining agent. Such groups may contain a contending faction or members of a rival union which would like to have the incumbent exposed to liability. Moreover, an employer-sponsored strike is certainly not beyond the realm of possibilty." *Id.*

If the industry can set Union Brother against Union Brother in internal disciplinary proceedings, it will corrode that unity which makes for bargaining strength on the Union side. It will divert Union activity and resources from serving the interests of the UMWA and District membership as against Carbon and the industry. It will shift the balance of bargaining strength now subsisting under law strongly in favor of the coal industry and against the UMWA. For this Court to sanction any such boon to the industry would disregard the bargaining history of the agreements and the conduct of the parties, and wreak a grievous disservice to the national labor policy.

VI. CONCLUSION

For the reasons stated herein, the Judgment below should be affirmed.

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY,

Petitioner,

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236; UNITED MINE WORKERS OF AMERICA, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

I. THE QUESTION PRESENTED

Respondents'[1] Brief (R.B. pp. 1, 2) mistates the legal issues in this case, and addresses instead a factual issue which was decided against them by the jury in the District Court. The Unions cast the issue as whether national labor policy in general, and the agreements here in question in particular, impose an implied duty upon a union, signatory to an agreement containing a no strike clause, to impose *discipline* upon members and subordinate branches which breach that clause. That issue was not decided by the District Court; was not ruled upon by

[1]Hereafter, Carbon will adhere to the designations of parties in its original brief (i.e. Petitioner Carbon Fuel Company, "Carbon"; International Union, United Mine Workers of America, "International"; District 17, "District" Local Unions No. 6572, 7626 and 2236, "Locals"; all the Labor Organizations, "Unions") and follow Respondents designation of the International and District as "UMWA."

the Court of Appeals; was not raised in the petition for certiorari, or the Unions' Brief in opposition to it; is not raised by the record in this case; and is not the issue before this Court. Rather, the issue before this Court is whether unions signatory to such agreements have an obligation to use all reasonable means to prevent and end strikes by members and subordinate branches in violation of the agreements, as has been held by the Third[2] and Eighth[3] Circuits, or whether a union so signatory, so long as it did not bring about or prolong the strike, can, with impunity, do "nothing", as the Court of Appeals held in this case. See Petition for Writ of Certiorari, Appendix at pp. 9-10 (Pet. A. pp. 9-10). The split between the Circuits on this issue apparently motivated this Court to grant certiorari. This is the issue to be decided.

It is not Carbon's position that this Court should rule the judgments in question to be proper because the UMWA did not discipline strikers. Rather, those judgments are proper and should be reinstated because the jury, upon proper instruction, decided that UMWA did not exercise "all reasonable means" to prevent and terminate the strikes. Whether the jury found that the means which should have been exercised involved discipline or one or more of various means available to UMWA cannot be determined from the general jury verdict. What is clear from that verdict is that the jury found that UMWA did not exercise "all reasonable means." Therefore, UMWA's emphasis on discipline, both in the issues portion and all other portions of its brief, is essentially directed at an argument that under

[2] *United States Steel Corp.* v:. *UMWA*, 593 F.2d 201, 209 (3rd Cir. 1979).

[3] *Wagner Electric Corp.* vs. *Local 1104*, 496 F.2d 954, 956 (8th Cir. 1974); followed in *Iowa Beef Processors* vs. *Amalgamated Meat Cutters*, 597 F.2d 1138, 1145 (n.14), (8th Cir. 1979).

the circumstances of these cases discipline would not have been reasonable. That argument was made to, and rejected by the jury, and has not been made since, until now. It has no place here.

II. STATEMENT OF THE CASE

UMWA's statement is occasionally misleading. Its contention that the "main function of the International Union is to negotiate wage agreements" while the districts "negotiate memoranda of understanding with coal companies * * *, and handle grievances which are not settled at the local level", and the locals "conduct the day-to-day affairs of the Union at each mine" (R.B. pp. 2, 3), is superficial and misleading. As the record shows, the International, not the Districts or Locals, is the exclusive bargaining representative of the production and maintenance employees of all of the operators who bargain with the Union (A. 28, 29); all of the employees are members of the International (A. 194); the International bargains and negotiates the collective bargaining contracts with the operators, with only such participation of its subordinate branches as it has established and permitted; and it enters into and signs the National Bituminous Coal Wage Agreements (A. 28, 29). The International is *the* Union bargaining representative and *the* contracting party, and the promises and commitments contained in the agreements are *its* promises and commitments. Moreover, the International has "supreme legislative, executive and judicial authority over all members and subordinate branches" (A. 194), and as such, exercises ultimate Union control over the implementation and administration of the agreements.

UMWA further argues in their "Statement" (R.B. pp. 4, 5), and throughout their brief, that their routine

procedure of sending District representatives to Local union meetings to advise members that "the strike was unauthorized, and against union policy," and that the members should return to work, without any further action on their part, was the only means, among all of the means available to them, reasonable for use in attempting to end the strikes. Thus, UMWA argues that the fact the majority of the strikes "lasted only one to two days," and that none lasted more than "five or six days," establishes that the limited procedures used were successful, and requires a conclusion that those procedures constituted reasonable means of dealing with the strike problem (R.B. pp. 4, 5, 9).[4] In this same vein, UMWA further argues Carbon presented no evidence that other available means of ending the strikes would have produced better results; and they emphasize that union witnesses expressed the opinion that the use of various alternative means to prevent and end the strikes would have proven "counterproductive" (R.B. p. 5). Although nothing is said concerning any action taken by the International and District to prevent wildcat strikes, or to stop the continuing pattern and practice of such strikes, and the evidence shows none, UMWA asserts that the International "took all steps which it regarded as reasonable and effective to terminate [each strike]." R.B. p. 42.

UMWA's argument that the limited steps taken by them to end the strikes were the only reasonably means

[4]As the evidence in this case showed, and the jury's verdict reflects, a one or two day strike has a very significant impact on coal production and operating costs. When such strikes are engaged in in the numbers and with the frequency shown here, they become intolerably burdensome and economically disastrous to the interests of all concerned. It cannot reasonably be maintained that the fact that the strikes lasted only from one to five or six days each shows that the limited steps taken by the UMWA dealt effectively with the problem. Again, UMWA's argument that they used the only means which it was reasonable for them to use, was rejected by the jury's verdicts.

available to them, and that all other means would have been unreasonable, begs the question presented in this case. The question is not whether the means used by the International and District were reasonable; but whether they had a duty to use any reasonable means at all. The District Court submitted to the jury the question whether the procedure used by the UMWA constituted "all reasonable means" that should have been used by them in attempting to prevent and end the strikes. The jury resolved that question against them. The Court of Appeals did not reverse the Trial Court's judgment because it found, contrary to the jury, that the means used by UMWA were all that were reasonably required of them under the circumstances; but, because it held that the International and District had no duty to use *any* means to prevent or end the strikes. Pet. A. pp. 9, 10. UMWA's argument that the action taken by them constituted the only reasonable action that they could take under the circumstances is inappropriate in the present posture of this case.

UMWA states (R.B. p. 10) that: "The only action identified by Carbon which the UMWA did not take was that it did not discipline its members or revoke the charters of locals." This is not correct. It was shown in evidence that under the Constitution of the International Union, there was a variety of means and procedures available to the International and District in attempting to prevent and stop the strikes. Disciplinary action against members was only one of the means available. Others included disciplinary fines or penalties against the Locals, official reversal of the strike action of the Locals (A. 195), revocation of the charters of the Locals, and creation of "provisional governments" for the Locals. A. pp. 194, 195. Moreover, express constitutional

sanction certainly is not required for the International to take such action as instructing striking members that not only were the strikes "unauthorized", but also in violation of the contract and unlawful, and that picketing in connection with the strikes was also unauthorized and unlawful, and that members were to remain at work or return to work despite picketing.[5]

[5]UMWA's directives that striking members return to work never directed them to return despite unauthorized and unlawful picketing. They never ordered anyone to work at a mine that was being picketed (A. p. 38); and they never took any disciplinary or other action to stop or prevent such picketing (A. pp. 106-07; 133).

III. ARGUMENT

A. A UNION BOUND BY A COLLECTIVE BARGAINING AGREEMENT CONTAINING AN EXPRESS OR IMPLIED NO-STRIKE CLAUSE HAS THE OBLIGATION, WITHOUT MORE, TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES BY ITS MEMBERS AND SUBORDINATE BRANCHES IN VIOLATION OF THAT CLAUSE.

The UMWA's argument is generally in reverse order to that in Carbon's brief—discussing the proper interpretations of the Agreements first (R.B. pp. 15-25) and then turning to the impact of National Labor Policy (R.B. pp. 25-47); whereas Carbon's organization, in its brief on the merits, was the opposite. This fact makes this reply brief difficult to organize so that the flow between the briefs is easily followed. Because Carbon believes its organization is the most logical, and makes the various points more easily understood, that organization will be retained here.

1. THE OBLIGATION TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES IN VIOLATION OF THE CONTRACT ENCOURAGES, AND DOES NOT FRUSTRATE, FREE COLLECTIVE BARGAINING.

As was pointed out in Carbon's original Brief (pp. 21-26), and not controverted by UMWA, effective implementation of the policy of our national labor laws, to make collective bargaining agreements to settle disputes peacefully through grievance and arbitration procedures work, requires that such agreements be enforceable. The record in this case shows clearly that as to Carbon, the UMWA's solemn promise to settle disputes peacefully has not been enforceable; and in order to make such agreements enforceable, UMWA must be held to an obligation to use all reasonable means to prevent and end strikes by its members and subordinate branches in violation of that clause.

Respondents assert, to the contrary, that implying such an obligation would "frustrate" and "contravene" the National Labor Policy, because (1) it provides for "vicarious liability" for parent unions contrary to the rulings of the Court and the legislative history or § 301; (2) it threatens unions with existing liability in contravention of policy protecting their financial stability; and (3) it permits unwarranted interference by employers in unions' internal affairs. Moreover, UMWA supports these arguments with unwarranted and unsupported conclusions of fact, which have no basis in the record, or in actual fact. In its arguments relating to National Labor Policy, UMWA totally ignores the plain fact that if it, as the exclusive collective bargaining representative of all of its members, purporting to speak for them and all of

its subordinate branches at the bargaining table and holding itself out as able to bind them to the commitments it makes there, can escape all affirmative responsibility for compliance with such bargaining commitments upon the grounds that its unilaterally established internal structure relives it of any obligation to secure performance of its agreement, the collective bargaining process which is the cornerstone of National Labor Policy becomes meaningless and futile.

2. THE IMPLICATION OF AN OBLIGATION UPON UMWA TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES IN VIOLATION OF THE AGREEMENT IS CONSISTENT WITH NATIONAL LABOR RELATIONS POLICY.

The requirement that the International and the UMWA use all reasonable means available to them to prevent and end wildcat strikes does no violence to traditional legal distinctions between parent unions and their membership and locals, and does not render the parent union "vicariously liable" for breaches of contract by its members and subordinate branches. Carbon does not claim that UMWA is liable for breaches by the Local of the *Local's* contract. Rather, Carbon seeks to hold the UMWA liable for breaches of a contract *it* made. The "all reasonable means" obligation does not make the UMWA liable on any theory of "vicarious liability." R.B. p. 28. It simply prescribes that it, as the exclusive bargaining representative of all of its members and the party making and entering into the Coal Wage Agreements, may be held liable for breaches of *its* agreement when *it* has failed to use all reasonable means available to it to assure compliance with the commitments *it* has made. The UMWA's liability it not purely derived or

based upon the relationship between the International and its subordinate branches, but upon its failure to comply with the contractual commitments which it has made.

Nor is the implication of such an obligation precluded by past decisions of this Court[6] or the legislative history of the Labor Management Relations Act of 1947. The legislative history of § 301 does not deal specifically with this issue, as contended by Respondents. It is clear from the legislative history that the Congress intended that unions be subject to suit for violations of no-strike clauses, so that such clauses would be enforceable and thus achieve their purpose to bring about labor peace during contract terms (see Carbon's original brief, pp. 21-24); and that in support of that goal, the provisions of Section 6 of the Norris LaGuardia Act (29 U.S.C. § 106), as interpreted and applied in *Carpenters* vs. *US*, 330 U.S. 395 (1947), are superseded by § 301(e), which establishes equal rules of responsibility for both management and labor. See R.B. pp. 30, 31. There was no extensive legislative consideration of how this new standard would be applied to the multiple and various situations in which strikes occur, or under the multiple and various differing structures of labor organizations and collective bargaining agreements. Rather, the discussion had was limited to charges by opponents to the bill that §301 would auto-

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[6] *United Mine Workers vs. Coronado Coal Co.*, 259 U.S. 334 (1921), relied upon at R.B. pp. 28-29 does not support the proposition that a labor organization, which is the exclusive collective bargaining representative of its members and which makes and enters into contracts in that capacity, has no duty to act affirmatively to prevent its members and subdivisions from violating the contract commitments which it has made as their representative. *Coronado, supra*, was a suit for damages for an alleged conspiracy in violation of the Sherman Act, and for the violent destruction of property in furtherance of a conspiracy by an independent district union seeking to organize a company. No question was presented in that case as to the obligation of the International, which was not a signatory to a contract, to take action to uphold its contractual commitments against violations by its members and subordinate branches.

matically make international unions liable for acts of members which they could not prevent or control,[7] to denials by supporters that such was the case,[8] and to statements that the purpose was to make unions and employers liable upon the same agency theory.[9]

Likewise, the colloquy between Senator Taft and Mr. Patterson relating to another similar bill, and quoted by UMWA at R.B. p. 33, does not establish any sort of congressional intent that a parent labor organization has no obligation to use reasonable means to see that its members and subordinate branches abide by a contract the parent has made. In that instance, as opposed to this case, the striking local was the sole signatory to the contract—the parent did not sign the contract but merely "approved" it. Hearings on S. No. 55, Senate Labor and Public Welfare Comm., 80th Cong., 1st Sess., p. 1551.

To the extent that this meager and scattered record of consideration by Congress of the potential liability of parent unions for acts of their members and subordinate branches does establish some sort of congressional purpose to protect such parents from liability, the implication of an "all reasonable means" obligation on those parent organizations does not contravene that policy. The UMWA was not held liable here for acts of its locals, but for its own failure to act. Had the UMWA acted reasonably to end the strikes (actions which were entirely within its discretion and absolute control), no liability on its part could or would have been found. Likewise, under the law as found by the District Court, no

[7]See remarks of Senators Killgore and Pepper, referred to in Respondents' Brief pp. 31, 32, n. 18, and the veto message of President Truman, 93 Cong. Rec. 7501, part 4.(6).

[8]See radio speech of Senator Taft, 93 Cong. Rec. A3232;

[9]See remarks of Senator Taft, 93 Cong. Rec. 6680.

other parent union would be liable because of actions beyond its control.

Moreover, an "all reasonable means" obligation is not inconsistent with the National Labor Policy of protecting unions from liability so as to maintain their "financial stability." R.B. p. 39. *International Brotherhood of Electrical Workers* vs. *Foust*, ____U.S.____, 99 S. Ct. 2121 (1979), does not stand for the proposition that the National Labor Policy expressed in § 301, to make collective bargaining agreements enforceable and labor organizations liable for breaches of contract, must be subjucated to considerations of "financial stability of unions." The *Foust* case, *supra*, is inapposite to the issue presented here. The question presented was whether the Railway Labor Act permitted an employee to recover punitive damages for breach of a union's duty of fair representation. No question was raised concerning a union's liability for compensatory damages. In *Foust*, *supra*, the Court pointed out that Congress had not specified whether punitive damages were available in such suits, and that it was therefore necessary that the Court decide whether awarding punitive damages "would comport with * * National Labor Policy" [Id. 2125]. The Court held that National Labor Policy would not be served by permitting "punitive damages, which, by definition, provide monetary relief 'in excess of * * * actual loss,' *Scott vs. Donald*, 165 U.S. 58, 86, 17 S. Ct. 265, 267, 41 L.Ed. 632 (1897), * * *." *Foust* in no way supports Respondents' argument that holding unions financially liable in compensatory damages for breach of contract is precluded by considerations concerning the depletion of union treasuries and a supposed resulting impairment of "the effectiveness of unions as collective-bargaining agents." R.B. p. 39.

Likewise, an "all reasonable means" obligation would not contravene the National Labor Policy of preventing employer interference with the internal affairs of unions. UMWA asserts that implying an obligation to use all reasonable means to prevent and end strikes in violation of the contract would permit employers "to dominate or interfere with the internal affairs of the Union." R.B. p. 40. Compliance with the contract's implied no-strike provision is not, however, an "internal affair" of the Union. On the contrary, it is the very heart of the collective bargaining relationship between the parties. The employer parties to the contracts are, of necessity, vitally concerned with the Union's performance of the agreements, and, therefore, with the efforts made, or not made, by the Union to secure compliance with its no-strike commitment. The actions of the Union, or the lack thereof, to secure performance of the no-strike commitment and maintain its "integrity" are clearly not matters dealing "only with the relations between the employees and their Union." R.B. p. 40.

Respondents say that their obligation to act to prevent and to stop violations of the implied no-strike clause is a non-mandatory bargaining subject, and that that 'the law would preclude the industry's insisting that the UMWA even bargain on the subject." *NLRB* vs. *Wooster Division, Borg-Warner Corp.*, 356 U.S. 342 (1958); R.B. p. 40. Even if it were to be assumed, *arguendo*, that the Union's obligation to prevent and stop such contract violations is a permisive bargaining subject only, the undisputed fact is that the Union did bargain and agree that "all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'settlement of disputes' article of this Agreement," and that it would "maintain the integrity of this con-

tract." The question is not whether the subject was a mandatory or permissive subject for bargaining; but rather the question concerns the legal effect of the provisions agreed upon. However, unlike the bargaining subjects at issue in *Borg-Warner, supra*, the subject of the obligation of the International to prevent and to stop violations of the implied "no-strike" provision of its contract with Carbon involves matters "between the employer and the employees", and does not deal "only with relation between the employees and their unions." [Id. 350].[10]

3. UMWA'S NATIONAL LABOR RELATIONS POLICY ARGUMENT IS BASED UPON FALSE FACTUAL PREMISES.

Finally, in its policy argument, UMWA makes unwarranted factual assertions which cannot be left unanswered. First, UMWA argues that the implication of an all reasonable means obligation amounts to a "rule of automatic UMWA liability for wildcat strikes" (R.B. p. 28); or constitutes the UMWA as "the guarantor of all industry losses from wildcat strikes" (R.B. p. 38). Con-

---

[10] *Borg-Warner* does not support Respondents' claim that the action to be taken by a union to prevent violations of the "no-strike" clause is only a permissive bargaining subject. In *Borg-Warner* the Court upheld the Board's finding that the employer had violated its duty to bargain by insisting (1) that the Union agree to conduct a secret ballot vote of all employees on the company's last offer in contract negotiations; and (2) that the International Union not be a party to the contract, although it, not the Local, was the exclusive bargaining representative certified by the NLRB. In holding that the employer's "strike vote" demand was a nonmandatory bargaining subject, the Court said:

> [Id. 350] " * * * It settles no term or condition of employment — it merely calls for an advisory vote of the employees. *It is not a partial 'no-strike' clause. A 'no-strike' clause prohibits the employees from striking during the life of the contract. It regulates the relations between the employer and the employees. * * * The 'ballot' clause, on the other hand, deals only with relations between the employees and their unions.* * * * It enables the employer, in effect, to deal with its employees rather than with their statutory representative." (Emphasis supplied).

trary to the Respondents' contentions, the all reasonable means obligation does not hold the UMWA automatically liable as "guarantors" or "insurers" of employer losses during any and all wildcat strikes. The International and District are liable only if they failed to exercise all reasonable means available to them to prevent[11] or end the illegal strikes. If they do so, and an illegal strike occurs or continues nevertheless, they are not liable.

UMWA argues (R.B. p. 35) that "[t]he purpose of requiring . . . resort to the grievance procedure rather than strikes is served by the present remedies . . . of discipline, injunction or other legal action" against the locals and their members. That is simply not true. When all employees at the operation engage in the strikes, as happened here, a mass discharge or suspension of all participants, which is not discriminatory, patently closes down the mine even longer. Discipline of strike leaders by the employer is usually impossible, because the locals will not reveal who the strike leaders are and UMWA makes no effort to discover their identity, A, pp. 105-06; 131-32. Likewise, an injunction running only to the locals is ineffective because they are judgment proof.

UMWA says in their brief (R.B. 37) that if it is held to have an affirmative duty to secure compliance with its contractual commitment to settle disputes through the grievance and arbitration procedure, rather than by strikes, it will be discouraged from incorporating such arbitration clauses in future contracts. This is tantamount to a declaration that if it is going to be held to perfor-

[11]Contrary to UMWA's assertion (R.B. p. 38), the jury's verdict does not "inflict" damages from the commencement of the strike. In each instance, the verdict against UMWA was for lesser amounts than that against the responsible Locals or Local, indicating that the jury was assessing damages only for that period of time after the UMWA had an opportunity to take reasonable steps. See the Court's charge, A.200.

mance of its current contractual commitments, it may not make similar commitments in the future. Carbon submits that a contractual commitment secured in collective bargaining, that disputes and differences will be settled peacefully without strikes during the life of the agreement, is of little value, if it is effectively unenforceable, and without practical meaning or effect. A promise which is violated wholesale and cannot be practicably enforced is scarcely better than no promise at all. If the UMWA wants to bargain in the future for deletion of the arbitration clause, nothing can prevent it from doing so. However, its suggestion that it will negotiate the arbitration clause out of future contracts if it is held to a duty to use reasonable means to secure compliance with the clause is not a legally sound basis for relieving it from liability for failure to abide by its obligation in past agreements.

UMWA says (R.B. p. 42) that the "reasonable means" obligation is so "vague" and "all embracing" that UMWA cannot "possibly know in advance how to satisfy [that obligation]." Yet the obligation to act reasonably, and to take reasonable steps to avoid or remedy potential injury and damages to others, is a well known standard in the law. Courts and juries deal constantly with such standards. In situations in which the extent of one party's legal obligations to another necessarily depends on varying facts and circumstances, it is the only practicable standard. The alternatives are absolute liability or absolute immunity from liability. In this case neither alternative is consistent with national labor policy and the UMWA's expressed commitment to "maintain the integrity" of the contract and that "all disputes which are not settled by agreement shall be settled by the

machinery provided" in the contract grievance and arbitration provisions.

The International and District argue (R.B., p. 43) that their use of disciplinary or any other means of attempting to prevent and stop unauthorized strikes in violation of the contract would not eliminate strikes. They so argued to the jury. However, the jury obviously believed that the use of discipline or other means could have prevented or stopped the strikes involved in this case. Otherwise, they would hardly have found failure to use reasonable means. Thus, UMWA's argument that none of the available means of combating the strikes could have been effective was rejected by the trier of the facts. Moreover, UMWA cannot maintain that the means available to them would not have been effective since, although they repeatedly told their members and locals that they would use some of the available means, the record shows clearly that they made no effort to do so. An authority that constantly threatens but never acts is easily defied.

UMWA also argues that any affirmative action by it to induce or coerce members and locals not to violate the contract would interfere with union democracy and impinge upon the objective of the LMRDA [29 U.S.C. §§ 401 et seq.] that "democratic opposition be allowed to develop within [labor organizations]." R.B., p. 44. Again, there is no conflict between the national labor policies favoring internal union democracy and the enforceability of collective bargaining agreements to settle disputes between employers and employees and their union peacefully through grievance and arbitration procedures, rather than by striking. Union democracy does not require that the performance of collective bargaining agreements be

made conditional upon dissident union members' choice to keep or breach the promises made by their bargaining representative. Nothing in the LMRDA suggests that the contractual obligations of unions and their members to employers must be sacrificed to rights of internal union democracy.[12]

B. ASSUMING, ARGUENDO, THAT THERE WAS NO IMPLIED COMMITMENT ON THE PART OF THE UMWA TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES IN VIOLATION OF THE CONTRACTS, SUCH AN OBLIGATION ARISES FROM THE TERMS OF THE CONTRACT ITSELF.

UMWA's argument as to the proper construction of the contracts is premised upon two[13] assumptions - (1) that the contract changes which were made in the 1947 and 1952 Agreements, whereby the express no-strike clause and the language obligating both parties to "exercise their best efforts through available disciplinary measures to prevent stoppages of work . . . ." were deleted, in 1947 and 1952 respectively, indicates that UMWA was intended to have no obligation to do any-

[12]Respondents argue that the due process requirements of the LMRDA [29 U.S.C. §411 (a) (5)] and Article III, Section 3 of the UMWA Constitution (Pl. Ex. 34), require such time consuming and cumbersome procedures that the imposition of fines, revocation of charters, appointment of a provisional government for a local, or other means of attempting to secure contract compliance by members or locals, is too slow a process to be effective. (Respondents' brief, pp. 44-45) However, it is not necessary that such measures be consumated immediately or during the existence of a relatively brief strike. Knowledge that UMWA talk about taking such measures is not an idle threat, and that such consequences are a real probability, would produce the same effect. Unions do effectively employ such procedures against members who act contrary to union policy, when motivated to do so. See: *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); and *NLRB v. The Boeing Co.*, 412 U.S. 67 (1973).

[13]UMWA likewise repeats the misconception, which permeates its brief, that the all reasonable means obligation necessarily imposes upon it an absolute obligation to exercise internal disciplinary powers in the event of a wildcat strike (R.B. 15).

thing with regard to wildcat strikes (R.B., pp. 15-20); and (2) that the pertinent contracts were negotiated against a background of consistent Court decisions which preclude a conclusion that the parties intended that UMWA could have any obligation to take any action with regard to wildcat strikes. Because each of those assumptions is erroneous, UMWA's conclusion is erroneous. Moreover, the interpretation urged by UMWA provides no real meaning for the language relied upon by Carbon — the express duty of the parties to "maintain the integrity of the contracts." If that language is to have any meaning, it must have the meaning attributed to it by Carbon.

1. THE BARGAINING HISTORY SUPPORTS RATHER THAN PRECLUDES AN IMPLIED OBLIGATION UPON UMWA TO USE ALL REASONABLE MEANS TO PREVENT AND TERMINATE WILDCAT STRIKES.

UMWA relies upon but a portion of the contract changes made in the 1947-1952 period. For the complete description of those changes, see Carbon's original brief, pages 30-34. UMWA ignores the effect of the deletion of the "able and willing" language, which was placed in the contract in 1947 for the purpose of denying any obligation on the part of UMWA to see to it that its members worked. See Carbon's original brief, p. 31 (n.1). More importantly, UMWA gives only an illusory and meaningless import to the inclusion of the maintenance of integrity language. R.B., p. 18, 19. Only by restricting its view to those changes in the contract which support its positions can UMWA draw its conclusion.

Upon review of the entire history, as accurately reported in *International U., UMWA*, (Boone County

Coal Corp)[14] 117 NLRB 1095 (1957), can the effect of the changes relied upon by UMWA be discerned. From that complete history, it is apparent that the 1947 deletion of the "best efforts through available disciplinary measures" language reflects no purpose that UMWA be free of all obligation to do anything about wildcat strikes. It reflects only a purpose to relieve UMWA of an obligation to use its internal disciplinary measures in each instance, to the exclusion of other means of ending such strikes, and to afford it flexability to use such other means when it is reasonable to do so.

The denial of an all reasonable means obligations renders the integrity language meaningless. The promise to "maintain the integrity of [the] contract and that all disputes and clauses which are not settled by agreement shall be settled [through the grievance arbitration procedure]" simply cannot be reduced to an "intention to refrain from actions which might frustrate or undermine the grievance procedures" (R.B. 18). The language reflects a positive, rather than passive, obligation. It is clearly not a mere commitment to refrain from action. It is a commitment to action.

Therefore, the net effect of the deletion of the "best efforts through available disciplinary measures" requirement, while retaining the "maintain the integrity of the contract" language, was to require the UMWA to take affirmative action to prevent and end strikes, while not requiring that the action taken consist in all cases of the

[14]Although this decision was denied enforcement by the Circuit Court of Appeals for the District of Columbia, *International Union v. NLRB*, 257 F.2d 211 (D.C. Cir. 1958), that denial was not based upon any finding by the Court that the facts found by the Board were erroneous, but because the D. C. Circuit made a now patently erroneous conclusion of law that there was no implied no-strike clause in the Agreements. See *Gateway Coal Co. v. UMWA*, 414 U.S. 368 (1974).

use of available disciplinary measures. In effect, the International and Districts were thenceforth required to use whatever available means of combating strikes were reasonable under the particular circumstances of each strike.

In like manner, the deletion of the express no-strike clause cannot logically have the meaning ascribed to it by UMWA—as insulating UMWA from liability for wildcat strikes. The deletion of the express no-strike clause cannot logically be said to affect, or be intended to affect, the responsibility of the various tiers of UMWA for strikes. The obvious intent and effect of that deletion was to provide that certain strikes over nonarbitrable issues were not violations of the contract. This Court commented on the effect of the very language relied upon by UMWA (R.B. 19) in *Gateway Coal Co. v. UMWA, supra,* 414 U.S. at 384, n. 15, and said:

> This [language] effectively rescinds certain no-strike clauses in two prior agreements. It does not, however, purport to negate any no-strike duty created by the present agreement.

With all respect, it is submitted that the apparently contrary dicta in *Lewis* v. *Benedict Coal Corp.*, 259 F.2d 346, 351 (6th Cir. 1958), and in a case following it, *Old Ben Coal Corp., v. Local 1487, UMWA,* 457 F. 2d. 162, 165. (7th Cir. 1972), simply does not make sense. Each Court stated, in effect:

> In addition [to preserving the right to strike as to non arbitrable matters] the language protects the Union from liability for spontaneous or 'wildcat' strikes, *which would be the kind of work stoppages subject to the settlement procedures of the agreement.* (Emphasis Supplied) [*Old Ben, supra,* 457 F.2d at 165]

Neither Court pointed out how wildcat stoppages would

be resolved through the settlement procedures, and Carbon has no conception of how that could be accomplished.

2. DECISIONS PRIOR TO NEGOTIATION OF THE CONTRACTS DID NOT REQUIRE AN INTERPRETATION THAT UMWA WAS NOT LIABLE FOR WILDCAT STRIKES.

UMWA argues (R.B. pp. 20-24) that the "law relating to the 1968 and 1971 Agreements when they were made plainly rejected UMWA liability for wildcat strikes." R.B. p. 23. Assuming, without proof, that the parties took prior court decisions into consideration in negotiating the Contracts (there is nothing in the record to suggest that they did), the law on this subject was far from clear. UMWA relies upon *United Construction Workers v. Haislip Baking Co.*, 223 F. 2d 872 (4th Cir. 1955), *Lewis* v. *Benedict Coal, supra,* and *International Union UMWA* v. *NLRB, supra,* for its "judicial gloss." Those cases constitute a slim reed upon which to rely for such "gloss." First *Haislip, supra,* was decided upon a contract identical in pertinent part to the 1947 National Bituminous Coal Wage Agreement (A. 174-150). Hence the Contract involved in *Haislip* did *not* contain the "integrity" language, and *did* contain the "able and willing" clause. *Benedict Coal's* language relied upon by UMWA is, as respectfully pointed out *supra,* incomprehensible *dicta.* Finally, the D. C. Circuit's opinion in *International Union* would, according to UMWA's reasoning, require a conclusion that the parties bargained the relevant language knowing that there was *no* no-strike obligation at all—only a mere "gentlemen's agreement." See Carbon's Brief in Chief, at p. 34. Indeed, after this Court's decision in *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), which inevitably foreshadowed its decision in *Gateway Coal, supra,* that the implied no-strike obli-

gation is not a "gentlemen's agreement," but a binding commitment, one would have expected the parties to subsequent negotiations to take seriously the conclusion in *International Union, supra,* that the integrity language creates an obligation on the part of UMWA to take affirmative action to *"induce or coerce [their members and subordinant branches] to refrain from striking."* 257 F.2d at 218. (Emphasis Supplied)[15]

Finally, UMWA relies upon *Blue Diamond Coal Co. v. UMWA,* 436 F.2d 551 (6th Cir. 1970), *cert. denied* 402 U.S. 930 (1971), a case decided in the last year of the 1968 Agreement. The Court in that case was not called upon to determine whether the "integrity" language implied any affirmative obligation upon UMWA. The portion relied upon by UMWA is wholly *dicta,* for in *Blue Diamond,* the Court affirmed a holding of UMWA liability, albeit on an agency theory.

Even if there were some merit to UMWA's claim of a background of unanimous decisions absolving it from any responsibility to do anything to enforce the performance of the contractual promises it made, such a claim should not preclude this Court from deciding this case in accordance with its view of what is right. This Court did so in *Gateway, supra,* in implying a no-strike clause from the mandatory grievance procedure, despite decisions to the contrary. There is simply no evidence in the record whereby one can conclude that the contracts were

[15]UMWA clearly recognized, as has been clear, that wildcat strikes in violation of the agreements have had the effect of imperiling the "integrity of the contract[s]." In its resolution, adopted in September, 1966, the UMWA supported the last in its series of formal threats to discipline responsible members for bringing about or prolonging such strikes by a resolution (A. p. 188) that:

> "willfull and ill-advised [strikes in violation of the contracts] on the part of local unions and individual members imperils the welfare of all members of the union and threatens the *integrity* of the joint contractual relationship in the coal industry." [Emphasis Supplied]

entered into with the understanding that any one or more previous Court decisions had established and settled the law as it was then and forever would be.

IV. CONCLUSION

The judgment of the Court of Appeals, insofar as it reversed the judgments against the District and International relative to the thirty-one strikes over arbitrable issues, should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY,

Petitioner

vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236, UNITED MINE WORKERS OF AMERICA,

Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF CARBON FUEL COMPANY

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IN THE

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UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236, UNITED MINE WORKERS OF AMERICA,
Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Bituminous Coal Operators' Association, Inc. (hereinafter referred to as "BCOA") respectfully moves the Court for leave to file a brief *Amicus Curiae* in support of the position of Petitioner, Carbon Fuel Company.

BCOA is a voluntary non-profit association of bituminous coal mine operators that have been unionized by the United Mine Workers of America ("UMWA"). Its members produce approximately 40 percent of the bituminous coal mined in the United States. BCOA is the sole and exclusive bargaining agent, recognized under the National Labor Relations Act, for its member companies in a multi-employer bargaining unit. Under its

Constitution and By-laws, BCOA is authorized to negotiate national wage agreements with UMWA. It is also authorized to interpret and aid in implementing labor agreements on behalf of its members.

In October, 1968, and in November, 1971, BCOA, on behalf of its members, entered into the National Bituminous Coal Wage Agreements that are involved in *Carbon Fuel Company v. United Mine Workers of America, et al.*, No. 78-1183. The decision of the United States Court of Appeals for the Fourth Circuit in the *Carbon Fuel* case directly affects those labor agreements. The decision purports to interpret those agreements and improperly holds that the United Mine Workers of America (the International Union) and District 17, United Mine Workers of America (District 17) may escape liability for illegal work stoppages by their members over arbitrable issues even though these unions failed to use any and all reasonable means at their command to prevent or terminate these illegal strikes.

Further, BCOA is the plaintiff in an action pending in the United States District Court for the Western District of Pennsylvania (Civil Action No. 75-1168) wherein BCOA is seeking a declaration that the International Union's failure to take prompt and effective action to prevent, stop, and end illegal work stoppages over arbitrable issues violated the International's contractual duty to BCOA under the National Bituminous Coal Wage Agreement of 1974.

BCOA has attempted to obtain "consents" to the filing of this brief pursuant to Supreme Court Rule 42. Counsel for Petitioner has given such consent, but counsel for Respondents has declined to do so. However, counsel for Respondents has stated to BCOA that Respondents would not oppose the filing of a Brief *Amicus Curiae* by BCOA.

WHEREFORE, BCOA moves the Court to allow the filing of the "Brief Of Bituminous Coal Operators' Association, Inc. As *Amicus Curiae* In Support Of The Position Of Carbon Fuel Company," which is submitted herein with the requisite number of printed copies.

Respectfully submitted,

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Counsel for *Amicus Curiae*,

Bituminous Coal Operators' Association, Inc.

Interest of the Bituminous Coal Operators.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY,

Petitioner

vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236, UNITED MINE WORKERS OF AMERICA,

Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF CARBON FUEL COMPANY

INTEREST OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.

Bituminous Coal Operators' Association, Inc. (hereinafter referred to as "BCOA") is a voluntary, non-profit association of bituminous coal mine operators that have been unionized by the United Mine Workers of America ("UMWA"). It was formed in 1950 out of an effort to

bring a degree of stability out of the labor-management relations chaos that had long characterized the coal industry. Since that time, BCOA has existed and continues to exist for the purposes of negotiating on behalf of its members periodic labor agreements with the UMWA, aiding its members in interpreting these agreements, devising and strengthening mechanisms for bringing about industrial peace in the coal industry, securing observance by members and by the UMWA of these agreements and engaging in other activities to improve stability of employment and harmonious labor relations in the coal mining industry throughout the United States.

The membership of BCOA includes both individual coal companies and state and local coal associations. Members of BCOA are located throughout all of the coal producing states and collectively produce approximately 40 percent of the bituminous coal mined in the United States.

BCOA is the sole and exclusive bargaining agent, recognized under the National Labor Relations Act, for its member companies in a multi-employer bargaining unit. Under its constitution and by-laws, BCOA is authorized to negotiate national wage agreements with UMWA. It is also authorized to interpret and aid in implementing such labor agreements on behalf of its member companies.

The United Mine Workers of America represents and acts on behalf of its members and subordinate administrative subdivisions, including district and local unions, for purposes of negotiating periodic labor agreements covering wages, hours of work and other conditions of employment, including provisions for the

settlement of grievances of its members and the prosecution of grievances on behalf of its members.

In October, 1968, BCOA, on behalf of its member companies, and UMWA, on behalf of its members, entered into the National Bituminous Coal Wage Agreement of 1968 (hereinafter the "1968 Agreement"). In November, 1971, BCOA, on behalf of its member companies, and UMWA, on behalf of its members, entered into the National Bituminous Coal Wage Agreement of 1971 (hereinafter the "1971 Agreement"). The instant case directly involves these labor agreements. The 1968 Agreement and the 1971 Agreement were entered into by BCOA to improve the wages, hours, conditions, and safety of UMWA members and to obtain, in return, the uninterrupted and faithful services of UMWA's members during the terms of those Agreements. In subsequent years, the most recent being 1978, BCOA and UMWA have entered into substantially similar labor agreements.

BCOA, therefore, has a compelling interest in the continued and faithful adherence by its members and by the UMWA to such labor agreements. BCOA also has a direct, vital and continuing interest in preserving and strengthening the contractual procedures for resolving grievances and disputes and in bringing industrial peace to the coal fields which have been plagued by a national pattern of illegal wildcat strikes over localized arbitrable disputes.

The decision of the Court below seriously undermines the efficacy of the "Settlement of Disputes" procedures contained in the 1968 and 1971 labor agreements and sanctions instability and unrest in the coal industry. Consequently, the Fourth Circuit's decision adversely

affects the interests of BCOA and all its member companies since that decision impinges directly and disastrously on one of BCOA's major concerns—the stability of industrial relations under its agreements. Moreover, the decision of the Court below poses a serious threat to the energy-consuming public and to the national economy since unrest and work stoppages in the coal fields curtail the available supply of coal throughout the United States and impede the growth of coal production and the institution of new coal producing facilities, which are essential to this country's efforts to meet the current energy crisis and increased demand for fuel.

QUESTION PRESENTED

Whether a labor organization has a legal obligation to use every reasonable means at its command to prevent and terminate illegal strikes by its members over arbitrable disputes, particularly where, as here, the union has expressly promised to maintain the integrity of its labor agreements?

STATEMENT OF THE CASE

A. Background Facts

This is an action under § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185.

Petitioner Carbon Fuel Company (hereinafter the "Company")[1] brought this suit against the United Mine Workers of America (hereinafter the "International Union"), District 17, United Mine Workers of America (hereinafter "District 17"), and Local Union Nos. 6572, 7626 and 2236, United Mine Workers of America (hereinafter the "Local Unions")[2] seeking injunctive relief and damages for a series of forty-eight strikes occurring during the years 1969-1973 inclusive. These strikes were allegedly in violation of the terms of the 1968 and 1971 National Bituminous Coal Wage Agreements.

The 1971 Agreement provided means for the peaceful settlement, through a mandatory grievance-arbitration procedure, of all disputes, differences as to the meaning and application of contract provisions, differences as to matters not specifically mentioned in the contract and any local trouble of any kind arising at a mine. These means included multiple-step grievance-handling procedures culminating, if necessary, in final and binding arbitration. Pursuant to Article XVII of the 1971 Agreement, the International pledged itself to make "an earnest effort" to settle all differences between itself and BCOA and any "local trouble" "at the earliest practicable time." Pursuant to Article XX of the 1971

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1. The Company is a member of BCOA.
2. The International Union is the duly recognized collective bargaining representative for the Company's production and maintenance employees.

Agreement, the International pledged itself to "maintain the integrity of the contract" and agreed that "all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Disputes' article of this agreement. . . ." Almost identical provisions were contained in the 1968 Agreement.[3]

BCOA contends that, as a consequence of the aforesaid undertakings in the collective bargaining agreements, the International Union and its administrative subdivisions are obligated to take appropriate and timely steps to assure compliance by their members with the agreements and to end illegal picketing and work stoppages. To accomplish this end, the International and its administrative subdivisions are obligated to use any and all reasonable means at their command to ensure contract compliance, and to prevent wildcat strikes by their members over arbitrable disputes.

B. Proceedings in the District Court

A jury trial on the issue of damages was held in the United States District Court for the Southern District of West Virginia. The evidence presented therein established the occurrence of forty-eight separate strikes, each of which was engaged in by all of the members of the Local Unions employed at the locations in question. The evidence further showed that none of the strikes had been formally called or authorized by the International, District 17 or any of the Local Unions, and

3. Similarly, almost identical provisions were contained in the 1974 Agreement and are contained in the current 1978 National Bituminous Coal Wage Agreement.

that representatives of the International and its subdivisions made verbal and written requests to the strikers to return to work. However, the evidence also showed that neither the International, District 17, nor any of the Local Unions took any disciplinary action or other steps to prevent or end the strikes.[4]

At the conclusion of the evidence, the District Court directed the jury to find that the Local Unions had violated the labor agreements with respect to all of the strikes because of the mass actions of their members and officers in participating in them. The issue of the liability of the International and District 17 was submitted to the jury with the instruction that the International and District 17 had a responsibility under the labor agreements to use all reasonable means available to them to prevent and end strikes in violation of the labor agreements, and that from such time as they had an opportunity to use such means and failed to do so, they were liable for the strikes. The question of the amounts of damages was also submitted to the jury.

The jury returned individual verdicts as to each strike, aggregating damages of $206,547.80 against the International Union, $242,130.80 against District 17, and

4. The International has authority under its Constitution, for example, to suspend the autonomy of any district or local union which instigates, aids or condones, ratifies or sanctions any illegal picketing or work stoppage. (*See* Article XVIII, UMWA Constitution.) The International also has authority to discipline all members, including officers and committeemen of subordinate subdivisions, who fail or refuse to comply with the labor agreements or who instigate, condone or ratify illegal picketing or work stoppages; and to refuse to defend local unions or individuals who engage in, condone or instigate illegal strike activity. (*See* Articles XV and XVI of the UMWA Constitution.)

$722,347.43 against the Local Unions. Judgments were entered pursuant to the verdicts with respect to each stoppage and all of the Unions appealed.

C. The Decision of the Fourth Circuit

The United States Court of Appeals for the Fourth Circuit affirmed the judgments against the Local Unions as to thirty-one of the strikes. With respect to the remaining seventeen strikes, the Fourth Circuit held that they were "sympathy strikes" and, as such, did not violate the collective bargaining agreements in light of this Court's decision in *Buffalo Forge v. United Steelworkers of America*, 428 U.S. 397 (1976).[5]

In addition, the Fourth Circuit reversed all judgments as to District 17 and the International on the grounds that the District Court had erred in instructing the jury that District 17 and the International "had the duty and responsibility to use all reasonable means to prevent or terminate the wildcat strikes, and that the failure to do so would render them liable for the work stoppages." The Fourth Circuit held instead that the proper test for imposing liability upon the District and the International was whether these unions had "instigated, supported, ratified, or encouraged any of the work stoppages."[6] Finding no evidence of such conduct in the record, the Fourth Circuit held that the District Court had erred in denying the motions of the International and District 17 for directed verdicts.

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5. This Court's decision in *Buffalo Forge* was rendered after the trial in *Carbon Fuel* had been completed.

6. *Carbon Fuel Co. v. United Mine Workers of America*, 582 F.2d 1346, 1350-1351 (4th Cir. 1978).

This Court granted the Company's petition for writ of certiorari to review the question of whether the International and District 17 may be held liable for illegal work stoppages because of their failure to use all reasonable means to prevent or terminate illegal strikes by their members over arbitrable disputes.

SUMMARY OF ARGUMENT

This action raises critical issues concerning our national labor laws and policy.

In the National Bituminous Coal Wage Agreements of 1968 and 1971, the United Mine Workers of America explicitly pledged to settle all local labor disputes by means of the grievance-arbitration processes established in the Agreements and to "maintain the integrity" of these Agreements. Further, the UMWA implicitly promised not to strike over arbitrable disputes during the terms of these Agreements. *Gateway Coal Company v. United Mine Workers of America*, 414 U.S. 368 (1974).

Despite these contractual undertakings, members of the UMWA have engaged in a national pattern and practice of picketing and work stoppages over localized arbitrable disputes. These illegal work stoppages by UMWA members have resulted in staggering losses in production, wages, medical benefits and pension benefits, and have also impeded this country's efforts to meet the current energy crisis and our increased demand for fuel.

At the same time, the International Union and its administrative subdivisions have utterly failed and refused to utilize the array of means available to them to effectively prevent or end these illegal strikes by their

members. In the instant case, the Court below held that the failure of the International Union and District 17 to exercise such reasonable means to attempt to prevent or end the illegal strikes against Carbon Fuel did not violate their contractual undertakings since the International and District 17 had not instigated, ratified or encouraged any of these illegal strikes. In fact, the Court below held that the International and District 17 could have done absolutely *nothing* throughout the duration of such strikes and still have avoided liability for losses suffered by Carbon Fuel as the result thereof.

Amicus BCOA respectfully submits that the Court below erred. The failure of the International and its administrative subdivisions to use all reasonable means at their command to prevent or end such illegal strikes by their members over arbitrable disputes necessarily constitutes a breach of their contractual obligations under the National Bituminous Coal Wage Agreements. The contrary view of the Court below frustrates fundamental principles of our national labor laws and policy and also runs directly counter to fundamental principles of traditional contract law.

Peaceful resolution of industrial disputes through arbitration is the keystone of our national labor policy. Labor Management Relations Act, § 203(d); *Boys Markets, Inc. v. Retail Clerks Union Local 770,* 398 U.S. 235 (1970); *Gateway Coal Co. v. United Mine Workers of America, supra.* Further, Congress has directed parties to labor agreements to utilize every reasonable effort to maintain the grievance-arbitration processes established by such agreements. Labor Management Relations Act, § 204(a).

The Fourth Circuit's decision frustrates national labor policy as it sanctions instability and unrest in the coal fields and completely undermines the arbitration processes agreed upon by the parties. The International Union and its administrative subdivisions possess an array of potent alternatives to influence their striking members to return to work. In fact, these alternatives frequently represent the only effective means available to induce Local Union members to end their illegal work stoppages. If the International and its administrative subdivisions are not legally required to utilize these means, their pledge to resolve all localized disputes exclusively by grievance-arbitration would be rendered totally illusory and national labor policy would thereby be frustrated.

This Court, in the 31 years since the enactment of the Labor Management Relations Act, has consistently fashioned federal labor law which furthers, rather than frustrates, our national labor policy. *E.g., Boys Markets, Inc. v. Retail Clerks Union Local 770, supra.* In the instant case, national labor policy will be furthered only by recognition of an implied contractual obligation on the part of the International and its administrative subdivisions to use all reasonable means at their command to prevent or terminate illegal strikes by their members over arbitrable disputes.

In addition to frustrating national labor policy, the Fourth Circuit's decision runs directly counter to fundamental principles of traditional contract law. It is well-settled, as a matter of contract law, that obligations shall be construed to be effective rather than nugatory. As shown above, the Fourth Circuit's holding that the International and its administrative subdivisions could

sit by and do *nothing* throughout the duration of prolonged illegal strikes and still avoid liability under the National Bituminous Coal Wage Agreements essentially renders the UMWA's broad contractual pledges illusory.

Further, the fact that the illegal work stoppages resulted from the unauthorized "wildcat" actions of UMWA members does not excuse the UMWA's breach of its promise to settle all localized disputes by means of grievance-arbitration. Under traditional principles of contract law, a party will ordinarily not be excused from complying with his contractual undertakings by the interference of extrinsic forces or third parties. In the instant case, the UMWA's "excuse" is even less sympathetic than those presented in the traditional common law cases. Unlike most of the promisors in the traditional cases, the UMWA in this case has the power and the means to influence the actions of the parties who are allegedly interfering with its performance under the agreements. BCOA contends that the International and its administrative subdivisions should at the very least be legally compelled to exercise these reasonable means to influence their striking members to return to work.

As the United States Court of Appeals for the Third Circuit recognized in *Republic Steel Corp. v. United Mine Workers of America,* 570 F.2d 467, 480 (3d Cir. 1978), it is not asking too much "that the International fulfill some of its own responsibility to umpire, adjust, adjudicate, and settle, and where necessary, to impose sanctions upon those members who wilfully repudiate the obligations under the contract, defy the internal laws of the union, and disregard the federal statutes that constitute our national labor policy."

Contrary to the Fourth Circuit's decision, there is nothing in the bargaining history of the National Bituminous Coal Wage Agreements to preclude an implied contractual obligation on the part of the International and its administrative subdivisions to use all reasonable means to prevent or end illegal strikes by UMWA members. This Court clearly rejected a similar argument regarding the 1968 Agreement in *Gateway Coal, supra.* To the contrary, the bargaining history and the language of the Agreements support recognition of an implied obligation on the part of the International and its administrative subdivisions to use all reasonable means at their command to prevent or terminate illegal strikes by their members over arbitrable disputes.

Finally, BCOA's position would not impose an unreasonable or impracticable standard on the International or its administrative subdivisions. If all reasonable means to prevent or end an illegal strike are exercised, and the strike continues nevertheless, the UMWA would not be held responsible. Rather, the International and its administrative subdivisions would simply be required to make a good faith effort to use all reasonable means available to them to fulfill their express contractual undertakings. A standard which required anything less would clearly frustrate our national labor policy.

ARGUMENT

I. As A Matter Of National Labor Law And Policy, The International Union And Its Administrative Subdivisions Have A Legal Obligation To Use All Reasonable Means At Their Command To Prevent Or Terminate Illegal Strikes By Their Members Over Arbitrable Disputes.

In this action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, the Court is called upon to interpret critical provisions of the 1968 and 1971 National Bituminous Coal Wage Agreements. Substantive federal common law, fashioned from the policy of our national labor laws, is the law to be applied in doing so. *Textile Workers Union of America v. Lincoln Mills,* 353 U.S. 448, 456 (1957).[7]

In the 1968 and 1971 National Bituminous Coal Wage Agreements, the International Union, for and on behalf of itself, its districts and its locals (hereinafter collectively referred to as the "Union"), explicitly promised to resolve all of its local labor disputes by means of the grievance arbitration process contained in the agreements. The *quid pro quo* for the Company's agreement to submit such disputes to grievance arbitration was an

7. In *Lincoln Mills, supra,* 353 U.S. at 457, the Court explained that "[t]he Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem."

implied contractual undertaking by the Union not to strike over such issues throughout the duration of the contracts. *Gateway Coal Company v. United Mine Workers of America,* 414 U.S. 368, 382 (1974). Moreover, the Union and BCOA mutually and explicitly agreed to maintain the integrity of these labor agreements.

The Court below held that the International Union and District 17 fulfilled their contractual undertakings so long as they did not authorize, support, ratify or encourage any illegal strikes by their members. In other words, according to the Court below, the International and District 17 could disclaim responsibility for the losses suffered by the Company as the result of such illegal strikes simply by sitting by and doing nothing to prevent or terminate these illegal strikes by their members.

Amicus BCOA respectfully submits that the Court below erred. Fundamental principles of our national labor laws and policy mandate an implied contractual obligation on the part of the International Union and its administrative subdivisions to use all reasonable means at their command to prevent or terminate illegal work stoppages over arbitrable disputes. As we will show below, such an obligation is essential to "preserve the integrity" of the collective bargaining agreements, particularly the critical "Settlement of Disputes" provisions of these agreements. The Fourth Circuit's failure to recognize and enforce the Union's implied obligation has, for all practical purposes, rendered the "Settlement of Disputes" provisions totally illusory in view of the consistent pattern of "wildcat" strikes throughout the nation's bituminous coal-mining regions. Consequently, the Fourth Circuit's decision frustrates our national

policy of voluntary settlement of labor disputes through arbitration and should be reversed.

A. The Decision Of The Court Below Sanctions Instability And Unrest In The Coal Industry And Completely Undermines The Arbitration Process Agreed Upon By The Parties.

The evidence presented in this case, as well as similar evidence presented in numerous other lawsuits, establishes that members of the United Mine Workers of America have engaged in a national pattern and practice of picketing and work stoppages over disputes which are subject to the grievance and arbitration provisions of the National Bituminous Coal Wage Agreements.[8] In fact, the coal mining industry has the worst record by far of any major industry in frequency of "wildcat" strikes and production and wages lost due to wildcat strikes. The effect of these work stoppages on the medical and pension benefits of active and retired UMWA members has been nothing short of disastrous.[9] More-

8. *E.g., Consolidation Coal Co. v. International Union, UMW,* 431 F. Supp. 787 (W.D. Pa. 1977) (dismissal of complaint reversed, 585 F.2d 586 (3d Cir. 1978)); *United States Steel Corp. v. United Mine Workers of America,* 534 F.2d 1063 (3d Cir. 1976); *Southern Ohio Coal Company v. United Mine Workers of America,* 551 F.2d 695 (6th Cir. 1977); *Old Ben Coal Corp. v. Local 1487, United Mine Workers of America,* 457 F.2d 162 (7th Cir. 1972).

9. During the period January 1, 1970 through September 15, 1975, the reported losses occasioned by illegal

(Footnote continued on following page)

over, this national pattern of illegal work stoppages by UMWA members has not only curtailed the available supply of coal throughout the United States, but has also impeded the growth of coal production and the institution of new coal producing facilities. The reduction in the available supply of coal resulting from these illegal work stoppages has thus posed a serious threat to the national economy, has caused the unemployment of many thousands of workers in other industries, and has impaired the national defense and the national goal of becoming self-sufficient in meeting our energy needs.

Despite this dismal history, the International Union and its administrative subdivisions have utterly failed and refused to exercise their authority to utilize any of the means available to them[10] to effectively end or attempt to end the national pattern and practice of illegal picketing and work stoppages by their members in violation of their contractual duty to submit grievance disputes to arbitration.

(Footnote continued from preceding page)

picketing and work stoppages by UMWA members with respect to member companies of BCOA were as follows:

Year	Man-days Lost	Pay Roll Loss	Tonnage Loss	Pension & Trust Fund Loss
1970	593,000	$21,459,000	11,389,000	$ 4,555,000
1971	565,000	21,981,000	8,762,000	3,739,000
1972	516,000	21,783,000	8,372,000	5,023,000
1973	529,000	26,298,000	7,043,000	4,817,000
1974	1,006,000	51,858,000	11,496,000	10,312,000
1/1/75-9/15/75	1,368,000	76,000,000	16,500,000	22,000,000

See, Complaint by BCOA at 6, *Bituminous Coal Operators' Ass'n, Inc. v. International Union, UMWA,* Civil Action No. 75-1168 (W.D. Pa.).

10. *See* Brief, *supra* at 11, n.4.

Recognizing that illegal strikes seriously threaten the integrity and efficacy of the agreed-upon arbitration process, the United States Court of Appeals for the Third Circuit has held in a series of decisions that the International and its subdivisions have an implied obligation under the National Bituminous Coal Wage Agreements to use any and all reasonable means at their command as might be needed to prevent and end illegal picketing and work stoppages by their members.[11] For example, in *Republic Steel Corp. v. United Mine Workers of America, supra,* 570 F.2d at 479-480, the Third Circuit found that "the International has a particularly grave responsibility to employ all reasonable means to ensure that unlawful action be halted:"

> The International union simply must bear certain obligations if it is to continue to be entitled to the rights and benefits accorded by our national labor policy. To the extent that any union—local, district, or international; craft, industrial, or independent—refuses to enforce appropriately authorized union discipline upon recalcitrant members who violate either collective bargaining agreements or internal by-laws of the union, that union can be said

11. *Bituminous Coal Operators' Ass'n., Inc. v. United Mine Workers of America,* 585 F.2d 586 (3d Cir. 1978); *Republic Steel Corp. v. United Mine Workers of America,* 570 F.2d 467 (3d Cir. 1978); *United States Steel Corp. v. United Mine Workers of America,* 534 F.2d 1063 (3d Cir. 1976). *See also Eazor Express, Inc. v. International Brotherhood of Teamsters,* 520 F.2d 951 (3d Cir. 1975). The United States Court of Appeals for the Eighth Circuit has also held that a labor union is required to use its best efforts to return illegally striking workers to their jobs. *Wagner Electric Corp. v. Local 1104, I.U.E.,* 496 F.2d 954 (8th Cir. 1974).

> to have abrogated a proportion of valued rights granted to the union under our national labor policy.
>
> We note that through the instrumentality of the federal court system, the American public has intervened in recent years on literally thousands of occasions to umpire, adjust, adjudicate, settle, or impose sanctions in disputes between the local, district, and international units of the UMWA and the coal operators. We do not believe it is asking too much that the International fulfill some of its own responsibility to umpire, adjust, adjudicate, and settle, and where necessary, to impose sanctions upon those members who wilfully repudiate the obligations under the contract, defy the internal laws of the union, and disregard the federal statutes that constitute our national labor policy. [Footnote omitted]

The refusal of the Court below to recognize this contractual obligation sanctions continued unrest and instability in the coal industry. The Fourth Circuit held that the International and District 17 fulfilled their contractual undertakings by sitting by and taking no steps whatsoever to prevent continuance or recurrence of illegal strikes by their members. The Fourth Circuit's decision is an invitation to Local Union members to strike with impunity over arbitrable disputes rather than to abide by the contractual undertakings to settle such disputes peacefully without interruption of production. Since Local Union members cannot be held personally liable for their participation in such illegal strikes,[12] and since most Local Unions of the UMWA

12. *See Atkinson v. Sinclair Refining Co.,* 370 U.S. 238 (1962).

are, for all practical purposes, "judgment-proof",[13] the only inducements to end illegal work stoppages by union members reside in the hands of the UMWA hierarchy, *i.e.* the International and its districts. The Fourth Circuit would allow the International and its districts to fulfill their contractual undertakings without exercising any of these inducements. For all practical purposes, the Fourth Circuit's decision sanctions and encourages even more illegal strikes by UMWA members. As a result, the Company is deprived of its contractual *quid pro quo;* labor-management disputes in the coal industry are relegated to the picket line rather than the arbitral forum; and fundamental principles of our national labor policy are frustrated. This Court, in order to vindicate our national labor policy, should reverse.[14]

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13. For example, it was recently observed regarding Local Unions of the UMWA that, "[T]o those familiar with local union finances, the threat of massive fines seemed a joke. Many locals have bank accounts of, say, $66.23." New York Times, March 7, 1978, at 24, col. 5.

14. In addition, if the Fourth Circuit's position were adopted, the already overcrowded federal courts would continue to be inundated with actions involving disputes between the UMWA and the coal operators. As Judge Aldisert recently observed in *Republic Steel Corp. v. United Mine Workers of America, supra,* 570 F.2d at 480, n. 18, the International Union, its districts or its locals have been named as defendants in actions in the United States District Court for the Western District of Pennsylvania alone in over 300 cases from January 1, 1972 to December 21, 1977.

B. National Labor Policy Clearly Favors Grievance Arbitration As The Instrument For Resolving Labor Disputes And Mandates That Parties To Labor Agreements Utilize Every Reasonable Means To Maintain The Grievance Arbitration Provisions Contained In Those Agreements.

Congress and this Court have long recognized grievance arbitration as the preferred instrument for purposes of resolving disputes between labor and management. Moreover, parties to labor agreements are directed by Congress to utilize every reasonable effort to maintain the grievance arbitration processes established by such agreements.

Explicit Congressional expression of our national labor policy favoring grievance arbitration appeared at least as early as 1947 when Congress stated in § 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), that:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Moreover, in § 204(a) of that Act, Congress declared that, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives shall "*exert every reasonable effort to make and maintain agreements* concerning rates of pay, hours, and working conditions." 29 U.S.C. § 174(a)(1) (emphasis added). Thus, the express language of the Labor

Management Relations Act requires the International and its administrative subdivisions to use *every reasonable effort* to prevent or end illegal work stoppages and thus maintain the integrity of the Settlement of Disputes provisions of the National Bituminous Coal Wage Agreements.

Further, as the Court recognized in *Lincoln Mills, supra,* 353 U.S. at 458, an even earlier expression of Congressional policy requiring an "every reasonable efforts" obligation can be found in Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, which denies injunctive relief to any person who has failed to make "every reasonable effort" to settle a labor dispute by negotiation, mediation or voluntary arbitration.

In the 31 years since the enactment of the Labor Management Relations Act, this Court has formulated an expansive body of federal law grounded upon the basic premise that industrial stability is best fostered by the substitution of arbitration for industrial strife. This keystone of federal labor policy was most thoroughly expounded in the opinions of the *Steelworkers Trilogy* in 1960.[15]

For example, in *United Steelworkers of America v. American Manufacturing Co.,* 363 U.S. 564, 566 (1960), the Court stated that the Congressionally-expressed national policy favoring peaceful resolution of labor disputes "can be effectuated only if the means chosen by the parties for settlement of their differences . . . is

15. *United Steelworkers of America v. American Manufacturing Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

given full play." And in *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578 (1960), the Court explained that the grievance-arbitration process is the most favored means for effectuating that policy,[16] and that the parties' objective in using the arbitration process is primarily to further *their common goal of uninterrupted production under the agreement.* The Court then held that an order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.[17]

Two years later, in *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95 (1962), the Court was called upon to resolve an issue that was in many respects analogous to the question presented in the instant case. In *Lucas Flour,* the union called a strike to protest the discharge of an employee. The collective bargaining agreement contained grievance-arbitration provisions which covered the dispute, but did not contain an express undertaking by the union not to strike. The Court held that, even in the absence of an express no-strike clause in the

16. The Court stated, 363 U.S. at 581:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

17. *Id.* at 582.

collective bargaining agreement, an agreement that certain disputes "will be exclusively covered by compulsory terminal arbitration" gives rise to an implied promise by the union not to strike in response to these arbitrable disputes during the term of the contract. *Lucas Flour, supra,* 369 U.S. at 106. The Court stated that "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare."[18]

With the recognition in *Lucas Flour* of a union's implied obligation not to strike in order to promote the arbitral process, it follows quite logically and necessarily that a union has a continuing obligation to use all reasonable means at its command to prevent or terminate illegal strikes over arbitrable disputes especially where, as here, the Union has expressly promised to maintain the integrity of the provisions of the Agreement. The contrary view of the Court below clearly runs directly counter to this Court's approach in *Lucas Flour.*

Eight years after the *Lucas Flour* decision, this Court reiterated the critical importance of arbitration in effectuating our national labor policy when it held in *Boys Markets, Inc. v. Retail Clerks Union Local 770,* 398 U.S. 235, 253 (1970) that a federal court has jurisdiction under Section 301 of the Labor Management Relations

18. *Lucas Flour, supra,* 369 U.S. at 105. The Court also explained that to hold otherwise than it did in *Lucas Flour* would "obviously do violence to accepted principles of traditional contract law." Similarly, *Amicus* BCOA submits that the Union in the instant case has a duty under principles of traditional contract law to use all reasonable means to prevent or end illegal strikes. *See* Brief, *infra,* at pp. 33-40.

Act to enjoin a strike over an arbitrable grievance, notwithstanding the anti-injunction provisions of the Norris-LaGuardia Act.

In *Boys Markets,* the Court explained that its earlier decision in *Sinclair Refining Co. v. Atkinson*[19] frustrated realization of the important national policy of promoting peaceful settlement of labor disputes through arbitration.[20] The Court explained that the *very purpose of arbitration procedures* is to provide a mechanism for the expeditious settlement of industrial disputes *without resort to strikes,* lock-outs, or other self-help measures. This basic purpose, continued the Court, is largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate. Thus the Court, expressly overruling *Sinclair,* held that Norris-LaGuardia's policy of non-

19. 370 U.S. 195 (1962). In *Sinclair Refining Co. v. Atkinson,* the Court held that the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 104, precluded a federal district court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement even though that agreement contained provisions, enforceable under § 301(a) of the Labor Management Relations Act, for binding arbitration of the grievance dispute concerning which the strike was called.

20. In making its determination in *Boys Markets,* the Court reviewed the history of the Norris-LaGuardia Act, the Wagner Act and the Labor Management Relations Act and emphasized that the Norris-LaGuardia Act was responsive to a situation totally different from that which exists today, noting the shift of congressional emphasis "from protection of the nascent labor movement to the encouragement of collective bargaining and administrative techniques for the peaceful resolution of industrial disputes." *Boys Markets, supra,* 398 U.S. at 250-256.

intervention by the federal courts should yield to the overwhelming national interest in voluntary settlement of labor disputes through arbitration:

> We conclude . . . that the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy, and consequently that the Norris-LaGuardia Act does not bar the granting of injunctive relief in the circumstances of the instant case.[21]

In *Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 368 (1974), the Court extended its holding in *Boys Markets* to situations involving collective bargaining agreements where the union's undertaking not to strike was an implied, rather than an express, undertaking. Moreover, the collective bargaining agreement involved in *Gateway* was the 1968 National Bituminous Coal Wage Agreement, which is one of the agreements involved in the instant case.

In the course of its opinion in *Gateway,* the Court emphasized that "[t]he federal policy favoring arbitration of labor disputes is firmly grounded in congressional command."[22] In accord with this strong federal policy, the *Gateway* Court went on to hold that a broad arbitration provision contained in an agreement will always give rise to an implied "no-strike" obligation unless the agreement contains language *expressly negating* an undertaking not to strike.[23] Thus, in light of the critical role that arbitration plays in our federal labor policy, and recognizing the devastating effect that strikes have on the arbitration process, the Court ruled that a no-strike obligation will be implied unless *expressly negated* in the contract.

21. *Boys Markets, supra,* 398 U.S. at 253.

22. *Gateway Coal, supra,* 414 U.S. at 377.

The same considerations require that the Union be implicitly obligated to use all reasonable means to prevent or terminate illegal strikes by its members over arbitrable disputes and that such an obligation can be avoided only by *express contractual language negating such undertaking.* Such a rule is essential to vindicate our national labor policy. The Union clearly has not expressly disclaimed this obligation in the National Bituminous Coal Wage Agreements of 1968 and 1971.

Finally, nothing in the Court's decision in *Buffalo Forge Co. v. United Steelworkers of America,* 428 U.S. 397 (1976) is inconsistent with BCOA's position. In fact, in *Buffalo Forge* the Court emphasized that the "driving force behind *Boys Markets* was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties." 428 U.S. at 407. The Court in *Buffalo Forge* simply held that *Boys Markets* did not control the factual situation presented in *Buffalo Forge* because the strike was not over any dispute between the union and the employer that was even remotely subject to the arbitration provisions of the contract.

In sum, peaceful resolution of labor disputes by means of grievance arbitration is without a doubt the

23. *Id.,* at 382.

overwhelming goal of our national labor policy today. Labor and management have been (and continue to be) strongly urged by Congress to establish grievance arbitration processes for resolving disputes that arise in their ongoing relationships. Moreover, Congress has explicitly directed the parties to *exert every reasonable effort* to maintain the agreements they have entered into. It is also clear, however, that despite express contractual undertakings to settle their disputes with management by means of the contractual grievance arbitration process, members of the United Mine Workers of America have consistently engaged in a nationwide pattern and practice of work stoppages over arbitrable disputes. These illegal work stoppages render the contractual grievance-arbitration provisions illusory and thus frustrate the goals of our national labor policy. All the while, the International Union and its administrative subdivisions take the position that their contractual obligations are fulfilled by merely sitting by and doing nothing to prevent or end the stoppages by their members so long as they do not instigate, support, ratify, or encourage any of these work stoppages. The Union's position cannot be reconciled with the overwhelming national interest in the voluntary settlement of labor disputes through arbitration. The Union's position must therefore give way to an implied contractual obligation to utilize all reasonable means at its command to prevent or terminate illegal work stoppages by its members over arbitrable disputes.

II. Fundamental Principles Of Traditional Contract Law Require That The International Union And Its Administrative Subdivisions Have A Legal Obligation To Use All Reasonable Means At Their Command To Prevent Or Terminate Illegal Strikes By Their Members Over Arbitrable Disputes.

As shown in Part I above, the decision of the Court below should be reversed since it frustrates fundamental principles of our national labor policy. As an additional ground for reversal, *Amicus* BCOA respectfully submits that the Fourth Circuit's decision runs directly counter to fundamental principles of traditional contract law.[24]

In the 1968 and 1971 National Bituminous Coal Wage Agreements, the International Union pledged to make "an earnest effort" to settle any differences which might arise between itself and the members of BCOA as well as "any local trouble" which might arise at the mines.[25] The International further agreed to:

> maintain the integrity of th[e] contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Disputes' article of this agreement unless national in character in which event the parties shall settle such disputes by free

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24. In *Local 174, Teamsters v. Lucas Flour, supra,* 369 U.S. at 105, the Court looked to "accepted principles of traditional contract law" as well as national labor policy in recognizing an implied contractual obligation not to strike when the labor agreement contains a grievance-arbitration provision.

25. See Article XVII of the 1971 Agreement and pp. 25-26 of the 1968 Agreement.

collective bargaining as heretofore practiced in the industry.[26]

In *Gateway Coal Co. v. United Mine Workers of America, supra,* 414 U.S. at 385, this Court determined that the above provisions in the 1968 Agreement gave rise to an implied no-strike obligation by the Union.

The evidence presented in the instant case established that the conduct of certain of the Union's members, on at least thirty-one occasions from 1969 through 1973, was inconsistent with the standards of conduct set forth in the above provision. In fact, as discussed in Part I above, UMWA members have engaged in a nationwide pattern and practice of illegal strikes over arbitrable disputes.

The decision of the Court below that, absent evidence of authorization or ratification of these breaches by their members, the International and District 17 are not liable therefor is simply and irreconcilably inconsistent with fundamental principles of traditional contract law.

First, one of the most basic principles of the common law of contracts declares that obligations shall be construed to be effective rather than nugatory. This principle has its origins in the English common law,

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26. 1971 Agreement at Article XX. The corresponding language at page 37 of the 1968 Agreement is identical except insofar as it designates the dispute settlement provisions as the " 'Settlement of Local and District Disputes' section" of the agreement. The machinery for dispute resolution provided for in the settlement of disputes article is a multiple-step grievance procedure culminating, if necessary, in final and binding arbitration.

where it has been expressed that contracts shall be interpreted *"ut res magis valeat quam pereat."*[27] *Mare v. Charles,* 4 W.R. 267, 25 L.J.Q.B. (n.s.) 119 (1856); *Vestry of St. Leonard's, Shoreditch v. Hughes,* 17 C.P. (n.s.) 137, 144 Eng. Rep. 55 (1864); *Broom v. Batchelor,* 4 W.R. 712, 25 L.J.Ex. (n.s.) 299 (1856). It has been recognized and applied by this Court[28] and by numerous other courts in this country.[29]

This fundamental principle has similarly been recognized by renowned legal scholars in the field of contracts. As Professor Corbin has explained, "[o]rdinarily, words in promissory form should not be interpreted so as to make them illusory."[30] Professor Williston has

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27. The literal translation of the Latin phrase is the following: "that the thing may rather have effect than be destroyed."

28. *Great Northern Ry. v. Delmar Co.,* 283 U.S. 686 (1931) (rail shipping rate schedule in contract construed so as not to violate long and short haul clause of Interstate Commerce Act); *Hobbs v. McLean,* 117 U.S. 567 (1886) (partnership agreement construed so as not to be invalid under statute prohibiting transfer of government contracts).

29. *E.g., Eazor Express, Inc. v. Teamsters,* 520 F.2d 951 (3d Cir. 1975) (no strike agreement by union construed as including duty to use all reasonable means to bring unlawful strike to an end); *Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Stevedores' & Longshoremen's Benevolent Society,* 265 F. 397 (E.D. La. 1920) (collective bargaining agreement construed as imposing liability on union for failure of employees to work according to contract in good faith); *Martin v. Meles,* 179 Mass. 114, 60 N.E. 397 (1901) (Holmes, C.J.) (agreement to make a contribution to a trade association upheld by broadly construing plaintiff's promises and actions so as to provide consideration).

30. 6 A. Corbin, Contracts § 546 (1962 ed. & Supp. 1964).

similarly declared that "an interpretation which renders the contract or agreement valid and its performance possible will be preferred to one which makes it void or its performance impossible or meaningless."[31]

Simply stated, a fundamental principle of our traditional contract law requires that when parties undertake a contractual obligation, a court should not lightly construe that contract so as to release the parties from that obligation.

This principle is particularly applicable in the instant case. The International Union and District 17 have expressly undertaken to settle all localized disputes pursuant to the grievance-arbitration machinery in the Agreements and to maintain the integrity of the Agreements. Although the International and District 17 possess an array of potent methods[32] for complying with their obligations in the event of illegal strikes by their members, the Court below held that District 17 and the International may sit by and do *nothing* throughout the duration of a prolonged illegal strike and still avoid liability under the collective bargaining agreements. Thus, for all practical purposes, the Court below has rendered the Union's broad contractual pledges illusory, in clear contradiction to traditional contract law.

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31. 4 S. Williston, Contracts § 620 (1961 ed. & Supp. 1978).

32. For example, the International has authority to suspend the autonomy of any District or Local Union which instigates, aides or condones, ratifies or sanctions any illegal picketing or work stoppage. (*See* Article XVIII of UMWA Constitution). The International is also authorized to discipline individual members who participate in such illegal activity. (*See* Article XV of UMWA Constitution.)

In *Eazor Express, Inc. v. International Brotherhood of Teamsters,* 520 F.2d 951, 960 (3d Cir. 1975), the Third Circuit recognized and applied the aforesaid principle in holding the International Brotherhood of Teamsters responsible for illegal strikes when it failed to use all reasonable means to prevent or end such strikes. The Third Circuit explained as follows:

> A no-strike agreement would be illusory indeed were a union to be permitted to avoid all responsibility under it for the duration of a prolonged strike which was being carried on by the concerted action of all its members employed in the struck operation, merely because the strike was not initially authorized or called by the union as an organization or by those of its officers who were specially empowered to do so. *Rather than to construe a contract as producing such a result, the courts will favor a construction making the mutual promises binding and giving the contract legal effect.* 1A *Corbin on Contracts* 8-9; 3 *Corbin on Contracts* 168-191; 17 *Am. Jur. 2d* 452 [emphasis added].

Amicus BCOA respectfully submits that traditional contract law similarly compels that the United Mine Workers of America and its administrative subdivisions be held responsible for the illegal strikes of their members when they fail to exercise all reasonable means at their command to prevent or end such illegal strikes.

Further, a corollary to the principle that a contractual promise should not be construed so as to be illusory is the principle that a contractual promise should not ordinarily be construed so as to be excused by the

interference of extrinsic forces or third parties. *Day v. United States,* 245 U.S. 159 (1917).[33]

This principle is also particularly applicable in the instant case. The Union has expressly promised to attempt to settle differences "at the earliest practicable time" and to settle "all [localized] disputes and claims" by the contractual grievance-arbitration machinery. Consequently, when members of the Union engage in a strike over an arbitrable grievance, that conduct violates the contractual pledge to settle such disputes exclusively by means of the grievance-arbitration machinery. The International and District 17 contend, however, that they should be excused for this breach absent evidence that they actually authorized or ratified the so-called "wildcat" actions of their members. They contend essentially that their failure to perform their contractual undertakings is excused since it was the result of interference by extrinsic forces, *i.e.* their unauthorized striking members. As shown above, however, the intervention of activities by such "third parties" ordinarily does not excuse the breach of a contractual promise.

Moreover, the Union's "excuse" in the instant case is even much less sympathetic than those presented in the traditional common law cases. Unlike most of the promisors in the traditional case law who have been held liable for failure to perform their contractual obligations due to the intervention of extrinsic forces or third

33. *Accord, Columbus Ry., Power & Light Co. v. City of Columbus,* 249 U.S. 399 (1919); *Barry v. United States,* 229 U.S. 47 (1913).

parties,[34] the International Union and District 17 have the power to influence the actions of the parties who are allegedly interfering with their performance under the labor agreements. As members of the International Union and of District 17, the strikers are susceptible to being influenced in their decision to strike, or to continue to strike, by an array of legitimate methods at the Union's disposal.[35] Yet the International and District 17 seek to disclaim responsibility for the illegal strikes without even exercising these means to prevent or end the illegal actions of their members.

In sum, under fundamental principles of contract law, the International Union and District 17 would ordinarily be held liable for breach of their contractual undertakings when their members take their arbitrable disputes to the picket line rather than to the grievance-arbitration machinery. The fact that such breach occurred as the result of unauthorized activities by "wildcatters" would ordinarily not excuse the breach. BCOA does not contend, however, that the International and District 17 should be held strictly responsible for all such unauthorized work stoppages. However, recognizing that the Union has at its disposal an array of alternatives for influencing the illegal strikers to return to work, BCOA contends that the International and District 17 should at the very least be compelled as a matter of contract law to exercise these alternatives to attempt to prevent or end the illegal work stoppages by their

34. For example, in *Day v. United States, supra,* the extrinsic force was an extraordinary flood; in *Columbus Ry., Power & Light Co. v. City of Columbus, supra,* the extrinsic force was wartime inflation; and in *Barry v. United States, supra,* the extrinsic force was a strike against the defendant coal supplier.

35. Brief, *supra* at 11, n.4.

members. Otherwise, their contractual undertakings will surely be rendered illusory.

Thus, for these additional reasons, the Court below erred in failing to recognize a legal obligation on the part of the International and District 17 to use all reasonable means at their command to prevent or end illegal strikes by their members over arbitrable disputes.

III. The Bargaining History Of The National Bituminous Coal Wage Agreements Does Not Preclude An Implied Obligation On The Part Of The International Union And Its Administrative Subdivisions To Use All Reasonable Means At Their Command To Prevent Or Terminate Illegal Strikes By Their Members Over Arbitrable Disputes.

The Court below refused to recognize a contractual obligation on the part of the International Union and District 17 to use all reasonable means to prevent or end illegal strikes by their members, primarily on the grounds that the "bargaining history" of the labor agreements showed no intent to impose any such obligation on the UMWA. The Fourth Circuit reasoned that since bituminous coal wage agreements as late as 1941 had contained express no-strike language and, in 1950-52 had also contained express language requiring the UMWA to exercise its best efforts to prevent work stoppages, the absence of such express provisions in the agreements in question precluded the court from implying such obligations.[36] *Amicus* BCOA respectfully submits that this so-called "bargaining history" theory is without merit and has in fact already been rejected by

36. *Carbon Fuel Company v. United Mine Workers of America, supra,* 582 F.2d at 1350.

this court in *Gateway Coal Company v. United Mine Workers of America,* 414 U.S. 368 (1974).

In *Gateway Coal,* the United Mine Workers of America argued, *inter alia,* that a "no-strike" clause should not be implied in the 1968 National Bituminous Coal Wage Agreement because express "no-strike" language had appeared in agreements as late as 1941 but was expressly rescinded in the 1947 agreement and in subsequent agreements, including the 1968 Agreement.[37] Despite this bargaining history, and despite the express "resission" language contained in the 1968 Agreement, the Court in *Gateway* nevertheless held that the broad "Settlement of Disputes" provisions in the 1968 Agreement gave rise to an *implied no-strike obligation.*

The Court should similarly reject the Fourth Circuit's bargaining history theory in the instant case. As discussed in Part I above, unless the International and its administrative subdivisions are required to exercise all reasonable means to prevent or terminate illegal strikes over arbitrable disputes, the arbitral process in the bituminous coal industry will be rendered illusory and fundamental principles of our national labor

37. The Union in *Gateway* relied upon Paragraph 1 of the Miscellaneous section of the 1968 Agreement which provides:

> Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void.

Gateway Coal, supra, 414 U.S. at 384, n. 15.

policy will be frustrated. The Union's evidence of bargaining history is a slender thread indeed upon which to base a contractual interpretation that would have such disastrous impact on our national labor policy. Instead, the Court should rule that the Union's implied duty to exercise all reasonable means to prevent or terminate illegal strikes by its members can be negated only where the contractual language itself contains an *explicit expression* of an intention to negate a "reasonable means" obligation. Clearly, there is no such explicit expression in either the 1968 or 1971 Agreement.

To the contrary, in the Settlement of Disputes provisions in both the 1968 and 1971 Agreements, the Union has expressly pledged to settle localized disputes as soon as practicable pursuant to the machinery provided in those provisions (*i.e.* pursuant to the grievance-arbitration process) and to maintain the integrity of the Agreements. Clearly, such promises must be construed to encompass the utilization of all reasonable means at the Union's command to attempt to settle such disputes by means of grievance arbitration rather than by work stoppages over such disputes. Accordingly, contrary to the Fourth Circuit's holding, the bargaining history and language of the National Bituminous Coal Wage Agreements support the Company's position that the International and its administrative subdivisions are legally obliged to use all reasonable means to prevent or end illegal work stoppages by their members.[38]

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38. The Union's evidence of bargaining history regarding "best efforts" actually consists solely of language that appeared only in the 1950-1952 labor agreement and that obliged the Union to "exercise [its] best efforts through available disciplinary measures to pre-

(Footnote continued on following page.)

Moreover, as discussed in Part I above, § 204(a) of the Labor Management Relations Act expressly mandates that employees and their representatives shall exert *every reasonable effort* to maintain the labor agreements they enter into. This explicit statutory duty cannot be negated simply by the appearance of an express "best efforts" clause in the 1950 National Bituminous Coal Wage Agreement and its absence in subsequent agreements.[39] Instead the more logical inference to be drawn from the absence of such express "best efforts" language in subsequent agreements is

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(Footnote continued from preceding page.)

vent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement." This language was simply removed from the agreement two years later. Unlike the "no-strike" language that had appeared in earlier agreements and was expressly rescinded, there was no provision inserted into the 1952 labor agreement to "rescind" the best efforts language nor was there any language inserted into any of the subsequent agreements indicating an intent by the parties to negate the obligation associated with such language. Accordingly, there is no evidence whatsoever that the parties—simply by silently removing certain language from the agreement in 1952—intended to negate a "best efforts" obligation for all succeeding agreements. Moreover, since the Court has refused to negate a no-strike obligation in the 1968 Agreement despite the express "recission" language in that very agreement, it necessarily follows that a "best efforts" obligation should not be negated where, as here, the 1968 and 1971 Agreements contain no expression whatsoever of any intent to negate such obligation.

39. In fact, it could be argued that the statutory command in § 204(a) invalidates as a matter of public policy even explicit expressions of an intent to negate a party's duty to use all reasonable means to fulfill its contractual undertakings.

that the parties assumed, rightfully, that such an obligation was implied as a matter of national labor law and of traditional contract law. In any event, the statutory command in § 204(a) constitutes further indication that the Fourth Circuit's bargaining history theory lacks merit.

In sum, there is nothing in the bargaining history of the labor agreements to preclude the Court from recognizing the legal obligation of the International Union and its administrative subdivisions to exercise all reasonable means at their command to prevent or terminate illegal work stoppages by their members over arbitrable disputes. On the contrary, the language of the agreements, as well as fundamental principles of labor law and contract law, require that such an obligation exist.

IV. An Implied Obligation On The Part Of The International And Its Administrative Subdivisons To Use All Reasonable Means At Their Command To Prevent Or Terminate Illegal Strikes Does Not Make The International And Its Administrative Subdivisions Insurers Of Compliance With Labor Agreements By Their Members.

The Company does not seek in this action to hold the International and District 17 strictly liable as "insurers" of the Company's losses during any and all illegal strikes by their members. Rather, the Company simply seeks to hold the International and District 17 responsible when they fail to make a good faith effort to exercise all *reasonable means* available to them to prevent or terminate such illegal work stoppages.

As discussed above,[40] the International and its Districts have authority to impose various sanctions on their Local Unions as well as on individual officers and members thereof who instigate, aid, condone, ratify or participate in illegal picketing or work stoppages. We are asking the Court to recognize that the International and its administrative subdivisions are legally obligated to exercise these available powers. If the Union does so, and an illegal strike continues nevertheless, the Union would not be held responsible.

Those courts which have adopted the position we advocate have made clear that if the union has exercised all reasonable means at its command to prevent or terminate an illegal strike by its members, the union will not be held liable for the employer's losses resulting from the strike. For example, in *Eazor Express, supra,* 520 F. 2d at 967, the Third Circuit spoke directly to this question:

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40. *See* Brief, *supra* at 11, n.4.

> If the unions had made a showing of the use of strong and punitive measures without result it would have been for the district court to determine whether they had relieved themselves from liability by fulfilling their obligation to exhaust all reasonable measures available to them to end the strikes. In determining whether available measures were reasonable the sole test would be whether they were within the power of the unions to employ and might be likely to be effective to end the strikes.

All of the additional cases which recognize an affirmative obligation on the part of labor unions to prevent or terminate illegal strikes similarly define that obligation as requiring *reasonable efforts. United States Steel Corp. v. United Mine Workers of America,* 534 F.2d 1063, 1073 (3d Cir. 1976); *Republic Steel Corp. v. United Mine Workers of America,* 570 F.2d 467, 479 (3d Cir. 1978); *Bituminous Coal Operators' Ass'n., Inc. v. United Mine Workers of America,* 585 F.2d 586, 596 (3d Cir. 1978). *See Wagner Electric Corp. v. Local 1104, IUE,* 496 F.2d 954, 956 (8th Cir. 1974).

Accordingly, as these courts have recognized, adoption of our position would not impose an unrealistic or impracticable standard of conduct upon the International or its administrative subdivisions. Rather, the International and its administrative subdivisions would simply be required to make a good faith effort to use all reasonable means available to them to fulfill their express contractual undertakings. A standard which requires anything less would clearly frustrate our national labor policy.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed with instructions to affirm the judgments of the District Court against the International Union and District 17.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY, *Petitioner*

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236, UNITED MINE WORKERS OF AMERICA, *Respondents*

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Washington Legal Foundation, Inc. moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in the above-captioned proceeding. Consent to the filing of the brief has been withheld by counsel for respondents.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public

interest. WLF has more than 50,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interests of businesses and consequently, the American public.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are primarily concerned with the end results of this lawsuit. None of the litigating parties is primarily focusing upon the general liability of district and international labor unions for damages created by unauthorized work stoppages. WLF's sole concern in this case is to uphold the ability of businesses victimized by "wildcat" strikes to collect compensatory damages from unions, whether they are local, district or international, which fail to take reasonable steps to mitigate these evils.

The economy of the United States is currently going through a turbulent period. One aspect of this turbulence is represented by an increasing tendency for employees to engage in unauthorized or wildcat work action for a variety of reasons. These actions create often significant economic expenses for employers as well as disruption of the stream of interstate commerce. Most importantly, wildcat strikes undermine the vitality of collective bargaining agreements. They

constitute a menace to harmonious relations between workers and management. WLF seeks to protect the interests of the Carbon Fuel Company, as well as all other similarly afflicted concerns, from the dangers of unauthorized strikes through the application of a reasonable effort standard of liability for damages linked to the local, district and international levels of the union hierarchy.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY, *Petitioner*

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236, UNITED MINE WORKERS OF AMERICA, *Respondents*

BRIEF OF AMICUS CURIAE, THE WASHINGTON LEGAL FOUNDATION

THE INTERESTS OF AMICUS CURIAE, THE WASHINGTON LEGAL FOUNDATION, INC.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 50,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interests of businesses and consequently, the America public.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are primarily concerned with the end results of this lawsuit. None of the litigating parties is primarily focusing upon the general liability of district and international labor unions for damages created by unauthorized work stoppages. WLF's sole concern in this case is to uphold the ability of businesses victimized by "wildcat" strikes to collect compensatory damages from unions, whether they are local, district or international, which fail to take reasonable steps to mitigate these evils.

The economy of the United States is currently going through a turbulent period. One aspect of this turbulence is represented by an increasing tendency for employees to engage in unauthorized or wildcat work action for a variety of reasons. These actions create often significant economic expenses for employers as well as disruption of the stream of interstate commerce. Most importantly, wildcat strikes undermine the vitality of collective bargaining agreements. They constitute a menace to harmonious relations between workers and management. WLF seeks to protect the interests of the Carbon Fuel Company, as well as all other similarly afflicted concerns, from the dangers of unauthorized strikes through the application of a reasonable effort standard of liability for damages linked to the local, district and international levels of the union hierarchy.

ARGUMENT

I. District and International Labor Unions Should Be Held Liable For Damages Caused By Unauthorized Strikes In Violation of Collective Bargaining Agreements When They Fail To Use Reasonable Efforts To Prevent Or End Them.

Unauthorized or wildcat strikes have been defined as: "strikes, slowdowns or work stoppages in violation of the no-strike provisions of a collective bargaining agreement."[1] These activities are characterized by "workers in a strong display of protest walking off their jobs in the hope of correcting something they believe unjust. They ignore the established methods for dealing with complaints and thus precipitate an unauthorized work stoppage."[2]

The problems raised by such unauthorized activities have been significant enough to warrant remedial attention from both Congress and the federal courts.

A. Labor Unions are liable for damages from unauthorized strikes even if a no-strike clause is absent from the collective bargaining agreement.

In 1947, Congress enacted the Taft-Hartley Act[3] in order to better balance the collective bargaining positions of unions and employers. Section 301(a) of the

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[1] Shearer, *Legal Remedies and Practical Considerations in Dealing with a Wildcat Strike*, 22 Drake L. Rev. 46 (1972).

[2] Handsaker, and Handsaker, *Remedies and Penalties for Wildcat Strikes: How Arbitrators and Federal Courts have Ruled*, 22 Cath. U.L. Rev. 279 (1973).

[3] 29 U.S.C. §§ 141-187 (1970).

Act [4] provides federal courts with the jurisdiction to entertain suits by either labor or management for breach of bargaining agreements.

By the late 1950's federal courts had begun to interpret this provision regarding wildcat strikes. The United States Supreme Court ruled that section 301 permitted specific performance to be required of a negotiating party (in this case an employer) to enforce a grievance arbitration clause. The Court in *Textile Workers Union* v. *Lincoln Mills* [5] reasoned that the arbitration provision of the collective bargaining agreement had been obtained by the union in consideration for an express no-strike pledge.

Several years later, the Court found that a no-strike clause would be implied if a collective bargaining agreement featured a compulsory arbitration provision. The Court in *Teamsters Local 174* v. *Lucas Flour Co.* [6] considered the strike action of the union as a breach of contract and allowed the employer to recover damages. Such a decision would comply "with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." [7]

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[4] 29 U.S.C. § 185(a). The Act states in part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[5] 353 U.S. 448 (1957).

[6] 369 U.S. 95 (1962).

[7] Id. at 105. Opinion was rendered by Justice Stewart.

Injunctive relief is also available to employers seeking to terminate wildcat work stoppages. It has been held that collective bargaining contracts with both mandatory arbitration and explicit no-strike clauses permit the use of section 301 injunctions.[8] This remedy was extended to agreements mentioning only mandatory arbitration in *Gateway Coal Co.* v. *United Mine Workers.*[9] Following the precedent of *Lucas Flour,* the Court found an implied no-strike clause. Justice Powell, in his opinion for the Court, stressed that: "absent an explicit expression of such an intention to eliminate any no-strike expression of such an intention to eliminate any no-strike commitments, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." [10] Lower federal courts have also found unions liable for violating implicit no-strike obligation." [11]

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[8] *Boys Markets, Inc.* v. *Retail Clerks Union Local 770,* 398 U.S. 235 (1970).

[9] 414 U.S. 368 (1974).

[10] *Id.* at 382.

[11] *See Eazor Express, Inc.* v. *Int'l Bhd of Teamsters,* 520 F.2d 951, 960 (3d Cir.), *cert. denied,* 424 U.S. 935 (1976); *United States Steel Corp.* v. *United Mine Workers,* 534 F.2d 1063, 1073 (3d Cir. 1976); *United Constr. Workers* v. *Haislip Baking Co.,* 223 F.2d 872, 876-77 (4th Cir.), *cert. denied,* 350 U.S. 847 (1955); *Armco Steel Corp.* v. *United Mine Workers,* 505 F.2d 1129, 1132 (4th Cir.) *cert. denied:* 423 U.S. 877 (1975); *Lewis* v. *Benedict Coal Corp.,* 259 F.2d 346, 351 (6th Cir.) (Stewart, J.), *aff'd by an equally divided Court sub nom. United Mine Workers* v. *Benedict Coal Co.,* 361 U.S. 459 (1958); *Blue Diamond Coal Co.* v. *United Mine Workers,* 436 F.2d 551, 554-56 (6th Cir. 1970); *Old Ben Coal Corp.* v. *Local 1487, United Mine Workers,* 457 F.2d 162, 164 (7th Cir. 1972). *See also* Circuit Judge (now Chief Justice) Burger's dissenting opinion in *Int'l Union, United Mine Workers* v. *N.L.R.B.,* 257 F.2d 211, 218-19 (D.C. Cir. 1958).

Amicus notes that as long as an arbitration provision is included in a collective bargaining agreement, the absence of an explicit no-strike provision will not allow unions to escape liability for damages due to wildcat strikes.[12] Carbon Fuel Company has an arbitration clause in its agreement with the United Mine Workers. Although the contract no longer contains an explicit no-strike clause,[13] the above mentioned cases demonstrate that an implied no-strike agreement is enough to hold the United Mine Workers liable for wildcat strike damages.

B. The Reasonable Means Theory of District and International Labor Union liability for unauthorized strikes as articulated by the Third Circuit of the United States Court of Appeals should be applied in this case.

Section 301 of the Taft-Hartley Act describes the agency liability of unions for the activities of their officers or members.[14] The scope of liability has been subsequently held by federal courts for 301 suits to be that of the "common law rules of agency. Express authorization of ratification is not required; authority

[12] This is not the case for sympathy strikes not involving disputes between labor and management. See *Buffalo Forge* v. *United Steelworkers*, 428 U.S. 397, 407-08 (1976); *Carbon Fuel Co.* v. *United Mine Workers*, 582 F.2d 1346, 1348-49 (4th Cir. 1978).

[13] *Carbon Fuel Co.* v. *United Mine Workers*, 582 F.2d at 1350.

[14] 301(b) of the Act, 29 U.S.C. 185(b) states in part:
(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter . . . shall be bound by the acts of its agents . . . (e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

may be implied or apparent." [15] An agent may act within his scope of authority "even when he commits an act specifically forbidden by his principal." [16]

One aspect of agency theory—the mass action principle—was employed in *Carbon Fuel* to find the local unions liable for damages caused by the wildcat strikes, which occurred despite the presence of arbitration provisions in the bargaining contract.[17] The definition of mass action was authoritatively expressed by the Court of Appeals in *Eazor Express*:

> When all the members of a union employed by a given employer engage in a concerted strike not formally authorized by the union, as happened here, many courts hold the union responsible on the theory that mass action by union members must realistically be regarded as union action. The premise is that large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members.

[15] *Mullett* v. *N.L.R.B.*, 571 F.2d 1292, 1294 (4th Cir. 1978). *See also United Mine Workers* v. *Gibbs*, 383 U.S. 715, 736 (1966); *Wagner Elec. Corp.* v. *Local 1104, Electrical Workers*, 496 F.2d 954, 956 (8th Cir. 1974); *N.L.R.B.* v. *Int'l Longshoremen & Warehousemen's Union*, 283 F.2d 558, 563 (9th Cir. 1960); *United Mine Workers* v. *Patton*, 211 F.2d 742, 747-48 (4th Cir. 1954).

[16] *N.L.R.B.* v. *Int'l Longshoremen & Warehousemen's Union*, 283 F.2d at 565.

[17] *Carbon Fuel Co.* v. *United Mine Workers*, 582 F.2d at 1349.

520 F.2d at 963.[18] If the union uses "reasonable measures" to try to encourage union members to return to work, then any striking workers are considered to be beyond the agency nexus.[19]

A restriction to the application of mass action to the union hierarchy was noted in *United States Steel Corp.* v. *United Mine Workers*. There the court stated:

> Consistent with theory, however, the liability must be limited to the entity whose membership acts in concert. In most cases, as here, that entity will be the local union. Thus absent a showing of complicity on the part of a larger union entity—the District or International Union, for example—only the local can be held liable under the mass action theory.

534 F.2d at 1074.

Complicity by a district or international union would presumably be actions which would have "instigated, supported, ratified, or encouraged any of the work stoppages. . . ." The district court in *Carbon Fuel* however

[18] *See United States Steel Corp.* v. *United Mine Workers*, 534 F.2d 1063, 1073-74 (3d Cir. 1976); *Wagner Elec. Corp.* v. *Local 1104, Electrical Workers*, 496 F.2d at 956; *Adley Express Co.* v. *Highway Truck Drivers & Helpers, Local 107*, 439 F. Supp. 436, 443-44 (E.D. Pa.), *reaff'd*, 365 F. Supp. 769 (E.D. Pa. 1973); *Vulcan Materials Co.* v. *United Steelworkers*, 430 F.2d 446, 455-56 (5th Cir. 1970); *United Textile Workers* v. *Newberry Mills, Inc.* 238 F. Supp. 366, 373 (W.D. S.C.), *aff'd*, 315 F.2d 217, cert. denied, 375 U.S. 818 (1963); *United States* v. *Bhd. of R.R. Trainmen*, 96 F. Supp. 428, 431-32 (N.D. Ill. 1951); *United States* v. *Int'l Union, United Mine Workers*, 77 F. Supp. 563, 566-67 (D. D.C.), *aff'd on other grounds*, 177 F.2d 29 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949).

[19] 26 Vand. L. Rev. 1331, 1336 (1973).

did not find evidence revealing such complicity.[20] Therefore, mass action would not appear to be able to reach the District and International United Mine Workers Unions in this case.

Nevertheless, a theory of liability does exist to hold the District and International liable for union wildcat stoppages. The Third Circuit has developed a theory centering around the need for unions to take reasonable steps to prevent or end unauthorized strikes to avoid liability for damages. This liability effects all union levels alike.

This doctrine has been most definitively articulated in *Eazor Express*. In that case, two locals of the International Brotherhood of Teamsters were faced with wildcat strikes. The two employers effected by the strikes brought a section 301(a) suit claiming damages from both the local and the international unions. The collective bargaining agreements with the unions contained explicit no-strike clauses. The district court found all unions liable, as did the Third Circuit. Judge Maris, in his opinion for the court, declared:

> The district court held that necessarily implied in the unions' agreement that there should be no strike was an obligation on their part to use every reasonable means to bring to an end a strike begun by their members without their authorization. With this conclusion we agree. As the district court pointed out, collective bargaining agreements such as these impose a continuing day-to-day obligation on the parties to fulfill their term in good faith. . . This is certainly true with respect to the obligation that there should be no strike pending the use of grievance procedure. Accord-

[20] *Carbon Fuel Co.* v. *United Mine Workers*, 582 F.2d at 1351.

> ingly, in the case of an unauthorized strike against their employer by all the members of a union who are employed by that employer, their union may not disclaim responsibility for the losses suffered by the employer as the result of the strike unless and until it has exhausted all reasonable means within its power to bring that unlawful action to an end.

520 F.2d at 959-60. Judge Maris supplied a cogent rationale for this holding:

> A no-strike agreement would be illusory indeed were a union to be permitted to avoid all responsibility under it for the duration of a prolonged strike which was being carried on by the concerted action of all its members employed in the struck operation, merely because the strike was not initially authorized or called by the union as an organization or by those of its officers who were specially empowered to do so. Rather than to construe a contract as producing such a result, the courts will favor a construction making the mutual promises binding and giving the contract legal effect.

Id. at 960.

The court emphasized that enforcement of the no-strike clauses was necessary, not only under contract law, but also to implement the fundamental national policy of replacing costly work stoppages with the benefits of arbitration.[21]

The fact that these no-strike provisions were "basic to the agreements" was emphasized by the *Eazor Express* court. To the court, it was "perfectly clear that the parties, both the unions and their members as well

[21] *Eazor Express, Inc.* v. *Int'l Bhd. of Teamsters*, 520 F.2d at 960.

> as the employers, intended that during the term of the agreements there should be no strikes or work stoppage pending exhaustion of the grievance procedure.[22]

A no-strike provision, *per se,* can not act as a guarantee that no wildcat actions will ever occur. Yet, the presence of this clause in a collective bargaining agreement necessitates an:

> obligation of the unions, which was necessarily implied in their promise, not only not to call a strike themselves but also to take timely steps to end such an unauthorized strike by employing any and all such reasonable means at their command as might be needed to get their members back to work. It was the breach of this obligation by the unions, not any responsibility for the particular unauthorized actions of their members, which generated liability on their part.

Id. at 962.

The Third Circuit examined the question of liability of local, district and international unions for wildcat strikes in the absence of an express no-strike clause in *United States Steel Corp.* v. *United Mine Workers.* The presence of a binding arbitration clause in the collective bargaining agreement was of much significance to the court. In his opinion, Judge Gibbons stated:

> The unions are parties to a contract not to strike over an arbitrable dispute, and they have a contractual obligation to use all reasonable efforts to perform that contract. Concern with the integrity and efficacy of the agreed-upon arbitration process is no less compelling when the covenant not to strike is implied rather than express.
>
> * * * *

[22] *Id.* at 961.

> From *Lucas Flour* we know that a no-strike undertaking will be implied from a grievance and arbitration clause. A covenant to maintain the integrity of the contract necessarily embraces a reasonable efforts obligation to comply with the no-strike promise.

534 F.2d at 1073.

A recent Third Circuit case involved the liability of local, district and international unions for damages due to a sympathy strike triggered by stranger picketing.[23] The court, in holding the international liable, remarked:

> This responsibility to use reasonable means to terminate the wildcat strike is heightened by the industry-wide nature of the contract between the International and Republic. Having signed on behalf of all its members, the International was perforce acutely aware of the effects of the challenged sympathy strike on its various local and district memberships . . . Indeed, the essence of our analysis of the *quid pro quo* nature of the labor contract would indicate that where there is an industry-wide contract, there is an *industry-wide commitment* to the peaceful settlement of grievances.

570 F.2d at 479.

Once a wildcat strike has started, courts in three circuits have mandated the unions to use reasonable

[23] *Republic Steel Corp.* v. *United Mine Workers*, 570 F.2d 467 (3d Cir. 1978).

means or their best efforts (a more rigorous standard)[24] to mitigate the effects of the work stoppage, if not end it completely. More forceful action than the issuing of an "exculpatory press release"[25] is required to absolve a union from liability.

The court in *Eazor Express* gave some examples of reasonable means available to unions to discipline wildcatting strikers: suspending or expelling strikers from their unions, disciplining the union officials involved with the strike, or placing the locals under trusteeship by the international. In any event, merely instructing union members to return to work (i.e. without mentioning disciplinary sanctions) is insufficient to escape liability.[26] A union's sanctions may escalate in severity gradually until all of its means are spent.[27] At that

[24] *See Bituminous Coal Operators Ass'n* v. *Int'l Union, United Mine Workers*, 431 F. Supp. 774 (W.D. Pa. 1977), 585 F.2d 586 (3d Cir. 1978); *Penn Packing Co.* v. *Amalgamated Meat Cutters, Local 195*, 497 F.2d 888, 891 (3d Cir. 1974); *Wagner Elec. Corp.* v. *Local 1104, Electrical Workers*, 496 F.2d at 956; *Adley Express Co.* v. *Highway Truck Drivers & Helpers, Local 107*, 349 F. Supp. at 444; *Vulcan Materials Co.* v. *United Steelworkers*, 430 F.2d at 457. *See also United States Steel Corp.* v. *United Mine Workers*, 519 F.2d 1249, 1256 (5th Cir.) *rehearing denied en banc*, 526 F.2d 377 (5th Cir. 1976) where the court stated that "it is clear that a union must effectively renounce its agents' actions if they participate in an unauthorized strike."

[25] *Wagner Elec. Corp.* v. *Local 1104, Electrical Workers*, 496 F.2d at 956.

[26] *Eazor Express, Inc.* v. *Int'l Bhd. of Teamsters*, 520 F.2d at 964. *See also* Fishman, and Brown, *Union Responsibility for Wildcat Strikes*, 21 Wayne L. Rev. 1017, 1034 (1975); Whitman, *Wildcat Strikes: The Unions' Narrowing Path to Rectitude?*, 50 Ind. L.J. 472, 478 (1975).

[27] Whitman, *supra* note 26, 26 478.

point, the union would pass beyond the scope of liability.

Amicus submits that the facts in *Carbon Fuel* place it under the coverage of the Third Circuit's reasonable means theory. The collective bargaining agreement between Carbon Fuel has made with the United Mine Workers contained an arbitration clause.[28] Although the unions concerned had not made an express no-strike pledge in the contract, such an action should be reasonably implied in order to explain the presence of the arbitration provision. Since wildcat strikes over subject matter relevant to the arbitral clause occurred, the United Mine Workers, even if it did not instigate, support or ratify these actions, was bound to use reasonable means to place the strikes under control. The local union (liable in any event under the mass action theory) district and international unions are jointly and severally liable to Carbon Fuel Company for strike damages.

II. Finding District and International Labor Unions Liable For Damages Caused By Unauthorized Strikes When Reasonable Efforts Are Not Made To Prevent Or End Them Is In The Public Interest.

Amicus recognizes that the reasonable means standard was rejected by the court in *Carbon Fuel.*[29] The Fourth, Sixth and Seventh Circuits generally follow the restrictive standards for union liability enunciated in the *Haislip* case. These circuits require the finding of active union involvement such as instigating, supporting or ratifying unauthorized strikes before liability will ensue. Amicus strongly submits, however, that the liability standard of the Third Circuit is the better law since its application would be more beneficial to the public interest.

[28] The contract was formally entitled, "National Bituminous Coal Wage Agreement of 1971."

[29] *Carbon Fuel Co.* v. *United Mine Workers,* 582 F.2d at 1350-51.

The occurence of unauthorized strikes is an evil which can have a significant impact upon an employer and, ultimately, the public he serves. Such strikes can:

> without warning cause serious and recurring losses of production and marketing and create a reputation for unreliability. The wildcat strike is additionally important to the employer because the threat of the wildcat strike poses a constant and serious threat to the efficient operation of the company, the ability of management to run its own operation and the development of an atmosphere of harmonious labor relations.

Shearer, *supra* note 1, at 46.

Federal courts have also warned of the calamities produced by unauthorized strikes. In a landmark case, the Fourth Circuit declared:

> It is perfectly clear not only that the 'wildcat' strike is a particularly harmful and demoralizing form of industrial strife and unrest, the necessary effect of which is to burden and obstruct commerce, but also that it is necessarily destructive of that collective bargaining which it is the purpose of the act the National Labor Relations Act to promote.

N.L.R.B. v. *Draper Corp.,* 145 F.2d 199, 203 (4th Cir. 1944).

The wildcat strike, which may occur at a moment's notice and with devastating impact upon an unsuspect-

ing employer, must be dealt within the most effective manner to deter such conduct in the future.

The collection of damages is certainly a fundamental aspect of deterrence. It is far superior to other remedies such as the discharge of strikers, injunctions or suits against individual employees. These actions may only intensify the wildcat strikes, not compensate the employer fully for his losses or be precluded by law.[30]

To fully implement the provision in section 301(a) permitting suits for damages, all union levels, if they fail to use reasonable efforts to restrict wildcat stoppages, should be held liable by the courts. One commentator has observed that:

> the benefit of including the international in the damage action lies in enhancing the possibility of collection on a judgment. The inclusion of the international in such an action may also serve as a catalyst to encourage the international to clean its own house and take stronger control of the local. . . . While unions are reticent to take such drastic measures such as the imposition of a trusteeship over a local union, the threat of damage action may encourage such measures.

Shearer, *supra* note 1, at 64. In this way, "constant industrial warfare" can be avoided.[31]

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[30] 89 Harv. L. Rev. 601, 604 (1976). The Taft-Hartley Act, in section 301(b) states in part:

> Any money judgment against a labor organization . . . shall be enforceable only against the organization . . . and shall not be enforceable against any individual member or his assets.

[31] Shearer, *supra* note 1, at 64. See 31 Vand. L. Rev. 706, 715 (1978).

Federal courts have also demanded that internationals assume responsibilities to enforce labor peace. The Third Circuit has emphasized:

> Our holding that the International may be liable is mandated by the public interest. The International union simply must bear certain obligations if it is to continue to be entitled to the rights and benefits accorded by our national labor policy. To the extent that any union—local, district, or international; craft, industrial, or independent—refuses to enforce appropriately authorized union discipline upon recalcitrant members who violate either collective bargaining agreements or internal by-laws of the union, that union can be said to have abrogated a proportion of valued rights granted to the union under our national labor policy.

Republic Steel Corp. v. *United Mine Workers,* 570 F.2d at 479-80.

Amicus finds that the public interest could only be served by applying the reasonable means standard to district and international unions. District, and especially international unions have far greater financial resources than locals. Their "deep pockets" should be made available to compensate employers for the miseries of wildcat strikes.

Amicus notes that in the case of the United Mine Workers' unions involved in *Carbon Fuel,* the U.M.W. international has had a direct impact upon the affairs of its district and local branches. The powerful international has not in the past hesitated to intervene in lower union affairs, such as assuming trusteeship over

district unions [32] or conscripting local officials as agents for international elections.[33] Holding the district and international liable is but a logical fulfilment of the national labor policy against unauthorized work stoppages.

CONCLUSION

When a collective bargaining agreement contains an arbitration clause, wildcat strikes concerning arbitral issues will be considered a breach of the contract, even if, as in *Carbon Fuel,* there were no explicit no-strike contractual provisions. An implied no-strike agreement will be read in by a court.

Under the reasonable means theory of the Court of Appeals of the Third Circuit, the local, district and international unions must use all reasonable means within their power to eliminate the unauthorized strikes. Failure to do so will result in liability for compensatory damages to the relevant employer. This theory is the better standard of liability because it reaches the district and international unions. These unions should be made responsible for various reasons, including the need for implementing the national labor policy of supporting arbitration, allowing the employer to be fully reimbursed for wildcat damages and because of the commitment by all union levels to the industry wide contract and its implicit no-strike provision.

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[32] *Hodgson* v. *United Mine Workers,* 344 F. Supp. 990, 993-97 (D. D.C. 1972).

[33] *Hodgson* v. *United Mine Workers,* 344 F. Supp. 17, 26 (D. D.C. 1972).

The dangers to employers of unauthorized strikes are immediate, direct and of a most profound nature. By reversing the holding of the Court of Appeals of the Fourth Circuit and substituting the reasonable means standard of union liability, this Court will be upholding the sanctity of collective bargaining agreements against unilateral wildcat actions.

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IN THE

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OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY,

Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT NO. 17, UNITED MINE WORKERS OF AMERICA, and LOCAL UNIONS NOS. 6572, 7626 and 2236, UNITED MINE WORKERS OF AMERICA,

Respondents.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

and

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

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Respondents.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 42(1), for leave to file a brief *amicus curiae* in support of the position of Petitioner, Carbon Fuel Company. The motion is necessitated by Respondents' position that, while they do not oppose the filing of a brief *amicus curiae* by the United States Chamber of Commerce, they decline to

consent to such. Carbon Fuel Company has verbally consented, but to date written consent has not been received.

The interest of the *amicus curiae,* the Chamber of Commerce of the United States, (the Chamber) is set forth in detail in its brief. To summarize, the Chamber of Commerce is the major association of business and professional organizations, both large and small, in the United States. The Chamber has a membership of over 3,700 state and local chambers of commerce and trade and professional associations, and a direct business membership in excess of 65,000.

The Petitioner and the *amicus curiae,* Bituminous Coal Operators' Association, represent solely the coal and power industries. Because both the direct and indirect ramifications of the Fourth Circuit's decision are of national significance to a wide range of industry and business, it is particularly appropriate for this Court to consider the views of a national organization, the Chamber of Commerce, which represents such a diverse group of industry and business, both large and small.

The Fourth Circuit has ruled that, absent a contract provision to the contrary, a union is not liable for a strike in violation of its collective bargaining agreement unless it instigates, supports or encourages that strike, and further, that the union has no duty to make any effort to terminate or prevent that strike. The court's decision directly intrudes upon the collective bargaining relationships of Chamber members, to their detriment. Moreover, it jeopardizes the production capabilities of those members who are, directly or indirectly, dependent upon the continuing availability of coal to meet their energy needs.

For these reasons, it is respectfully requested that the motion of the Chamber of Commerce of the United States of America for leave to file a brief *amicus curiae* in support of the Petitioner be granted.

Respectfully submitted,

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BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of

over 3,700 state and local chambers of commerce, and trade and professional associations, and a direct business membership in excess of 65,000. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests, before the courts, the U.S. Congress, the Executive Branch and independent regulatory agencies of the Federal Government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

The question presented in the instant case is of vital concern to the Chamber and its members: Is a union liable for damages in a Section 301 suit where it fails to exercise all reasonable efforts to prevent or terminate a

[1] E.g., *Buffalo Forge* v. *Steelworkers,* 428 U.S. 397 (1976); *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union 100,* 421 U.S. 616 (1975); *Gateway Coal Company* v. *United Mine Workers of America, et al.,* 414 U.S. 268 (1974); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville, etc., et al.,* 417 U.S. 12 (1974); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkel, et al.,* 416 U.S. 115 (1974); *N.L.R.B.* v. *Bell Aerospace Company Division of Textron Inc.,* 416 U.S. 267 (1974); *Boys Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970); *N.L.R.B.* v. *Granite State Joint Board,* 490 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 517 (1971); *N.L.R.B.* v. *The Boeing Company, et al.,* 412 U.S. 67 (1973); *New York Telephone Company, et al.* v. *New York State Department of Labor, et al.,* —— U.S. ——, 47 U.S.L.W. 4303 (Mar. 27, 1979).

strike by its members over a dispute which is arbitrable under the collective bargaining agreement, especially where the union promises to maintain the integrity of that agreement and settle all disputes through the grievance and arbitration procedure?

Strikes in violation of contract undermine industrial stability which is the promise of collective bargaining. The failure to abide by the orderly procedures for resolution of disputes under negotiated grievance and arbitration procedures is not countenanced by our national labor policy. However, such violations in the coal mining industry have become epidemic. *Bituminous Coal Operators' Association, Inc.* v. *United Mine Workers of America,* 585 F.2d 586, 590 (3rd Cir. 1978). This condition threatens not only the vitality of this basic industry, but, on a broader scale, the primacy of arbitration and ultimately the fabric of collective bargaining. Predictability and industrial peace are the only significant employer benefits which the typical collective bargain yields. But these benefits become illusory when the promisor is not accountable. Impunity begets irresponsibility. Accountability must be strictly enforced. In support of that belief, and on behalf of its members, all of whom are clearly stakeholders in this controversy, the Chamber submits this brief *amicus curiae.*

Summary of Argument

The Fourth Circuit has ruled that the UMWA and its District 17 are not in any way liable for damages caused by 31 strikes called by its locals, in violation of the UMWA national agreement, to settle disputes arbitrable under that

agreement. At issue is whether the UMWA and District 17 are liable for their failure to take all reasonable efforts to prevent or terminate those strikes, especially where the UMWA has promised to maintain the integrity of its agreement and settle all disputes through the grievance and arbitration procedure.

The 1947 amendments to the National Labor Relations Act crystallized three areas of congressional thought pertinent here: (1) that the collective bargaining process and the national purpose it serves would be revitalized by making labor organizations legally responsible for their conduct, particularly for breaches of their bargaining agreements; (2) that final and binding arbitration of contract disputes was preferred, as a matter of national policy, to concerted, economic activity; and (3) that once the parties came to terms, there was a positive duty on each of them to exert every reasonable effort to maintain the terms of their agreement. Relying on the stated preference for arbitration as a principal means for facilitating the free flow of commerce, the Court has, in a series of decisions, found that a promise to arbitrate creates for employers and unions rights and obligations which, though not expressed in the contract, are necessary to preserve the central place of arbitration. Such interpretations will be invoked unless the parties have bargained explicit provisions to the contrary. The Fourth Circuit ignored this interpretation of congressional will, holding in effect that the benefits of arbitration, while supporting a duty not to strike, would not support an affirmative obligation to take all reasonable steps to neutralize a strike. Given a history of employee behavior in the coal industry with its enormous losses in production as well as employee bene-

fits, this narrow view of legal responsibility only further undermines congressional objectives of peace through accountability and arbitration. Furthermore, it is directly at odds with congressional requirement that unions, employers and employees exert every reasonable effort to maintain agreed upon working conditions, and it ignores the fact that labor organizations may properly invoke sanctions to further their ligitimate interests.

By its terms, the UMWA's national agreement relies upon grievance and arbitration procedures as the exclusive means of resolving local disputes. The union promises "to maintain the integrity" of its agreement and to make "earnest efforts" to settle disputes through contractual means. These commitments, which are of the essence of the agreement, coupled with the Act's "every reasonable effort" requirement and the policy which protects arbitration as a national asset, operate to impose on the UMWA an "all reasonable efforts" duty.

POINT I

A requirement that a contracting union take all reasonable steps to prevent or terminate strikes over arbitrable grievances is necessary to the goal of industrial peace and is supported by the policy favoring arbitration.

The labor agreement is *sui generis*. Its construction begins but seldom ends with an isolated examination of its terms. "Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance, [citation omitted], and by the require-

ments of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship." *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 550 (1964).

Any analysis of the question at hand quickly implicates core concepts of federal labor policy. Early on, this Court assessed that the Wagner-Connery Act of 1935 ordained more than a system of meet and confer. "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 236 (1938). The full measure of that assessment would not legally be recognized until the enactment of the Labor-Management Relations Act in 1947. Principal among congressional concerns prompting the 1947 amendments was the greatly increased strength of organized labor gained under the protections of the Wagner Act—a shift causing reexamination of the extent to which unions should be treated as having equivalent responsibilities within the bargaining process and under the resulting collective agreement. *Cox, Some Aspects of the Labor-Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 277 (1947). Congress proceeded on two fronts. In adopting Section 301(a),[2] it acknowledged the need to deter work stoppages during the term of the agreement.

[2] 29 U.S.C. 185(a): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

> "It is apparent that until all jurisdictions, and particularly the Federal Government, authorize actions against labor unions as legal entities, there will not be the mutual responsibility necessary to vitalize collective-bargaining agreements.
>
> . . .
>
> "It has been argued that the result of making collective agreements enforceable against unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract. . . . any union with the status of 'representative' under the NLRA which has bargained in good faith with an employer should have no reluctance in including a no-strike clause if it intends to live up to the terms of the contract. The improvement that would result in the stability of industrial relations is, of course, obvious." S. Rep. No. 105, 80th Cong., 1st Sess. 16, 17-18 (1947), reprinted in I, Leg. Hist. of the Labor-Management Relations Act, 1947, at 422, 423-424 (1948).

To give the concept of responsibility full play, Congress added Section 301(e),[3] thereby restoring common law principles of agency and removing the shield labor had theretofore enjoyed under the Norris-LaGuardia Act. *United Brotherhood of Carpenters and Joiners of America* v. *United States*, 330 U.S. 395 (1947); *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966).

[3] 29 U.S.C. 185(e): "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

In a parallel move, Congress assured that the bargaining process, no less than the resulting contract, would henceforth be characterized by mutuality of obligation. Particularly offensive in congressional eyes had been the NLRB's treatment of employer attempts at the bargaining table to impose on unions contractual commitments to the integrity of the collective agreement.

> "Notwithstanding the difficulties of instituting suits against unions under present law and of collecting judgments resulting from their breaking their contracts, if an employer asks the union to take steps making it legally responsible for its contract violations, the Board is apt to say the employer is 'unfair' and punish him for 'refusal to bargain' [citations to Board decisions omitted]. The Board has held that an employer is not 'bargaining in good faith' when he asks the union to agree to a 'no-strike clause' and it has disregarded such clauses when unions have agreed to them [citations to Board decisions omitted]." H. R. REP. No. 245, 80th Cong., 1st Sess. 19-20 (1947), reprinted in I, Leg. Hist. of the Labor-Management Relations Act, 1947, at 310-311 (1948).

From these and similar considerations evolved Section 8(d), defining the duty to bargain as a mutual obligation, and Section 8(b)(3), making it an unfair labor practice for a union representative to refuse to bargain collectively. The Board got the message rather quickly. In a 1948 decision, the Board, in effect, elevated discussion of a no-strike proposal to the status of a mandatory subject of bargaining, contrary to its trial examiner who had held, consistent with earlier precedent, that, "obviously", employers could not extract such commitments from unions

as the price of an agreement, for to do so would "defeat the very purpose for which the Act was enacted." *Shell Oil Company, Inc.*, 77 NLRB 1306, 1351.

Complementing Section 301's command of contract enforceability against unions was congressional endorsement of final and binding arbitration as the preferred method of resolving contract disputes.[4] This provision, for which virtually no comment is recorded in the legislative history, would lay dormant for thirteen years until it bloomed as the centerpiece in the *Steelworkers* trilogy.[5] The essence of the trilogy was that the promise to arbitrate, in return for the promise not to strike, "is at the very heart of the system of industrial self government" and has as its objective "the common goal of uninterrupted production" (*Warrior & Gulf Navigation Co.*, 363 U.S. 581, 582); the process therefore deserves the broadest utilization consistent with what has been promised.

The congressional policy fostering arbitration, with its attendant benefit of industrial peace, has through judicial construction in Section 301 suits been deemed of sufficient force to:

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[4] Section 203(d), 29 U.S.C. 173(d): "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

[5] *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

(1) compel an employer to arbitrate even the most doubtful claims, absent "positive assurance" of non-arbitrability, *Warrior & Gulf Navigation Co.*, supra;

(2) compel an employer to arbitrate claims arising under the agreement, but after its expiration, absent an express exclusion of such claims from arbitration, *Nolde Brothers, Inc.* v. *Local 358, Bakery & Confectionary Workers Union*, 430 U.S. 243 (1977);

(3) compel a successor employer to arbitrate (with a minority union no less) under his predecessor's agreement the claims of his predecessor's employees now employed by the successor, *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964);

(4) imply a no-strike obligation from an employer's undertaking to submit contract grievances to arbitration, absent an express negation of such obligation, *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962) (a damage action), *Gateway Coal Company* v. *United Mine Workers of America*, 414 U.S. 368 (1974) (a suit for injunctive relief).

Carrying the favored policy still further, the Court has determined that union abuse of the arbitration process (violation of its duty of fair representation), despite employer good faith, shall not be permitted to deny rightful expectations of employees under the contract. If abuse is shown, Section 301 will provide a remedy. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). And this is so notwithstanding the rendition of a "final and binding" award.

> "The contractual system would [in the event of union abuse] cease to qualify as an adequate mechanism to secure individual redress for damaging

> failure of the employer to abide by the contract. Congress has put its blessing on private dispute settlement arrangements provided in collective agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity." *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

The ultimate demonstration of the strength of this congressional policy is found in *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970), later assessed in these words:

> "Indeed, the strong federal policy favoring arbitration of labor disputes was the linchpin of this Court's reasoning in *Boys Markets*. Denial of all equitable relief for breaches of no-strike obligations would have carried 'devastating implications for the enforceability of arbitration agreements' [citing *Boys Markets*]." *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368, 381-382 (1974).

The Court in *Gateway* saw no meaningful distinction in the form of relief to be made available, be it damages or injunction. "The policy considerations . . . are equally compelling." Id. n. 14.

As a result of this emerging viewpoint, the weight of the policy has been sufficient to impress upon a labor contract a duty which, even though not articulated, bears a necessary relation to the contract's consideration, furthers the national purpose for which the contract exists, and is not contrary to its express provisions. This most significant development in our labor law over the last several

decades was brushed aside by the court below in favor of an outmoded analysis. Finding that neither the International nor district unions had agreed to indemnify the employer, or use their "best efforts" to prevent a work stoppage, and further finding that neither union had authorized, ratified or encouraged any work stoppage, the court concluded that liability did not extend beyond the local unions. Authority for that conclusion was bottomed on *United Construction Workers and United Mine Workers of America* v. *Haislip Baking Company,* 223 F.2d 872 (1955), a Fourth Circuit decision which, though it issued more than twenty-three years earlier, was regarded as controlling.

Haislip turned on the fact that the International Union neither authorized nor sanctioned the illegal strike and that the contract did not make it liable for such activity; thus, the court reasoned, there was no conduct or contractual undertaking upon which to premise liability. However, this looks at only half the picture. We are not concerned here with affirmative action causing work stoppages, but rather with affirmative action to prevent work stoppages. Considering that *Haislip* was decided in a different judicial climate[6] which later would be swept away by this Court's expansive interpretations of Section 301 rights and remedies, one must question the wisdom of placing *Carbon Fuel* "squarely within the four corners of

[6] For example, at that time Circuit opinion held that an executory agreement to arbitrate, in a labor contract, was not specifically enforceable because of the common law prohibition against such relief, rooted in commercial contract law. *Lincoln Mills of Alabama* v. *Textile Workers Union,* 230 F.2d 81 (5th Cir. 1956), rev'd., 353 U.S. 448 (1957).

Haislip", thereby eclipsing the significance of every major Section 301 decision referenced above.

Congressional concern is clear that grievance arbitration is the preferred route to stability and that a contracting union is accountable when it foresakes arbitration for more primitive rites. That principle is surely frustrated by a doctrine which allocates liability only to irresponsible active participants, but shields an acquiescent party to the contract. The Fourth Circuit, and others, have had no difficulty in holding a local union liable on the "mass action" theory. That proposition rests on two premises. First, a common sense, behavioral presumption that large numbers do not act in concert without leadership. Second, and most significant, "a functioning union *must be* held responsible for the mass action of its members" (emphasis added).[7] The very thought prompting Congress to enact Section 301. Under the decision of the court below, this proposition does not reach beyond the local level despite the fact that the UMWA is party to the contract. Yet realistically, local union liability is a fiction, a dead letter from the moment of judgment. Local union officers and committee functionaries are rank and file miners. Individual members of the local are insulated from a money judgment. 29 U.S.C. 185(b). Local assets are negligible to non-existent because the local has relatively few members and because, under the International's Constitution (Article 13,

[7] *Eazor Express, Inc.* v. *International Brotherhood of Teamsters,* 520 F.2d 951, 963; cited with approval in *Carbon Fuel,* 582 F.2d 1349.

Section 2), *two thirds of every dues dollar is siphoned to the upper tiers of the organization.*[8]

The record confirms the fact of immunity and the results that flow from nonaccountability. In a five year period, man days lost to so-called "wildcat" strikes under the National Bituminous Coal Wage Agreements rose from 500,000 in 1972 to in excess of 2,200,000 in 1977. In 1976, coal operators within District 17 alone experienced over 400,000 man days lost. Losses in welfare and pension fund contributions rose from $5 million in 1972 to $45.1 million for the first eight months of 1977.[9] How much of this strike activity would be actionable under present law is not known.[10] Precision in numbers is not,

[8] At the time of the strikes in *Carbon Fuel,* membership in a local union within defendant District 17's jurisdiction averaged 125 members. Averages for local unions in other districts ranged from 85 to 170 members. District 17, consisting of 96 local unions, had a bank balance of only $30,957.00 as of December 31, 1970. *Hodgson* v. *UMWA,* 344 F.Supp. 990, 997 (D.D.C. 1972) aff'd, 475 F.2d 1293 (D.C. Cir. 1973). By contrast, UMWA had a bank balance of $44,731,770 as of that same date, with total assets exceeding $94 million. *U.S. Department of Labor,* Labor Organization Annual Report (LM-2) for calendar 1970, p.2.

[9] Bituminous Coal Operators Association's statement to UMWA at the commencement of negotiations for a successor agreement in October, 1977. 1 Collective Bargaining—Negotiations and Contracts, (BNA) 12:655-656.

[10] A reflection of the conduct, if not a measure of its legality, is the fact that in the same five year period, over 300 cases were filed against the UMWA, its districts or locals, just in the U.S. District Court for Western District of Pennsylvania. *Republic*

(Footnote continued on following page)

however, requisite to a conclusion that the conduct portrays a virtual abandonment of the *quid pro quo.* Nor have expressions of sentiment for internal reform been encouraging. At a special UMWA convention of 1,800 delegates called to formulate goals for what is now the current National Agreement (the product of a 111 day strike), "not a single delegate" would endorse a resolution penalizing local unions for engaging in wildcat strikes.[11] It is time for the policy which holds a functioning local union responsible because it "must be", likewise to hold a parent, contracting union responsible for the same reason.

A contracting union, committed to a no-strike promise, express or implied, is, absent a clear disclaimer, surely obligated to do in good faith all that it reasonably can to vindicate that pledge, given a threatened or existing strike over an arbitrable grievance. The Court said some years ago that "[n]ational labor policy requires that national unions be encouraged to exercise a restraining influence on explosive strike situations; . . ." *UMWA* v. *Gibbs,* 383 U.S. 739. That recognition was followed eight years later by *Gateway's* rule implying a no-strike pledge where necessary to the arbitration promise, and not expressly

(Footnote continued from preceding page)

Steel Corp. v. *UMWA, et al.,* 570 F.2d 467, 480 n. 18 (3rd Cir. 1978). In fiscal 1975, "there were about 300 Boys Market injunction cases in the Southern District of West Virginia alone involving wildcat strikes." *Cedar Coal Co.* v. *UMWA, et al.,* 560 F.2d 1153, 1168 (4th Cir. 1977). Carbon Fuel contested 48 strikes in this action; 17 were declared to be sympathy strikes and thus not actionable even as to the local unions.

[11] *Labor Relations Yearbook,* 241-242 (BNA) 1977.

negated by a provision permitting a strike. The "reasonable efforts" duty spoken of here is the corollary required if the implied obligation of *Gateway* and the restraining influence encouraged by *Gibbs* are to have any significant effect. Such duty serves the national purpose; to deny it would have devastating implications for the arbitration function.[12] Recognition of that duty is within the reach of Section 301 in the exercise of judicial ingenuity to fashion from the nation's labor laws a responsive jurisprudence. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 456-457. Indeed, that ingenuity need not be innovative because Congress itself has specifically created a broad, reasonable efforts obligation:

> "CO-EQUAL OBLIGATIONS OF EMPLOYEES, THEIR REPRESENTATIVES, AND MANAGEMENT TO MINIMIZE LABOR DISPUTES
>
> (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—
>
> (1) exert *every reasonable effort* to make and *maintain* agreements concerning rates of pay, hours, and working conditions, . . ." 61 Stat. 154, 29 U.S.C. 174 (emphasis added).

[12] A breach of a no-strike pledge in pursuit of an arbitrable grievance does not relieve an employer of its duty to arbitrate that dispute unless the contract expressly so provides. *Packing House Workers Local 721* v. *Needham Packing Co.*, 376 U.S. 247 (1964). A requisite to *Boys Markets* relief is employer willingness to arbitrate the underlying dispute. *Boys Markets, Inc.* v. *Retail Clerks*, 398 U.S. 254.

The express or implied contract obligation to refrain from strikes is one of the more obvious "working conditions" which the parties and the employees are bound to maintain. It was a companion provision in 29 U.S.C. 173(d), (the congressional declaration favoring arbitration) that the Court elevated from obscurity to provide the underpinning for the *Steelworkers* trilogy. The interpretation argued for herein is literally coincident with congressional mandate, whereas the decisions reached in *Warrior, Wiley, Nolde, Lucas Flour, Gateway Coal, Vaca, Hines, Needham,* and *Boys Markets,* supra, are simply extensions of congressional preference for the arbitration process. They secured the primacy of arbitration and achieved its beneficial effects.

The judicial response sought in the instant case would further buttress that process. Moreover, it would conform to the fabric of our labor law, particularly when one considers that national policy permits severe consequences to flow when one strikes in violation of contract or in violation of notice requirements, i.e., he loses his protected status. *NLRB* v *Rockaway News Supply Co.*, 345 U.S. 71 (1953); 29 U.S.C. 158(d). To the extent that "reasonable efforts" embrace union discipline, there is an established body of law upon which to build. Congress has recognized the right of a union to "enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." 73 Stat. 522, 29 U.S.C. 411(a)(2). The Court has recognized the right of a union to discipline its members, by fine, suspension from membership or expulsion, in order

to maintain the integrity of its ultimate weapon, the strike. *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967). A union may likewise discipline its members in order to enforce production ceilings, negotiated for the benefit of bargaining unit members generally. *Scofield* v. *NLRB (Wisconsin Motor Corporation)*, 394 U.S. 423 (1969). So long as the rule to be enforced serves a legitimate union interest, neither the NLRB nor the federal courts will review the reasonableness of fines imposed to coerce compliance. *NLRB* v. *Boeing Company*, 412 U.S. 67 (1973). Thus, if a union is permitted the right and discretion to further its self-interest, equity should not blanch at the logic of requiring reasonable efforts to assure the integrity of one's contractual promise. The strikebreaker, unfaithful to the union's mission, is perversely akin to the striker who is unfaithful to the union's promise.

A reasonable efforts requirement does not aggravate the several concerns which have been expressed when the topic of vicarious union liability has been considered. It has been observed that "unions could be destroyed if they could be held liable for damage done by acts beyond their practical control" *UMWA* v. *Gibbs*, 383 U.S. 736-737 (a Section 303 damage suit for violence by local union members). That is a different issue. *Eazor Express*, supra, presenting the current refinements of the reasonable efforts duty, found that the local and international unions were not responsible for precipitating the strike in violation of the contract. Instead, liability was pegged to the fact that within forty-eight hours of the strike's inception, the unions knew that their modest efforts to restore peace (oral and written exhortations to return to

work) were inadequate, that stronger measures were necessary, but were not undertaken. Accordingly, damages were measured from the time beginning forty-eight hours after the strike commenced. If that formula leads to destruction of unions, it is a case of self-destruction for refusal to perform acts within "their practical control". A separate concern, also noted in *Gibbs* is that unions should be encouraged to exercise a restraining influence and such efforts should not expose them to liability, on a ratification theory, for misconduct which has already occurred. 383 U.S. 739. Efforts to police one's agreement are the antithesis of ratification of contract misconduct, whereas the failure to do so could, depending upon circumstances, evidence condonation and be a separate basis for liability.

A final concern which has been expressed is that stern measures by a union against irresponsible members would be counterproductive, would simply create greater controversy and tend to extend rather than terminate the work stoppage. While such a result is conceivable, does that possibility justify doing nothing? Employers have been similarly confronted in attempts to comply with requirements under the Occupational Safety and Health Act. 84 Stat. 1590, 29 U.S.C. 651, *et seq.* In *Atlantic & Gulf Stevedores, Inc., et al.* v. *OSAHRC*, 534 F.2d 541 (3rd Cir. 1976) the employers were accused of failing to require that their longshoremen employees wear hard hats in conformity with an OSHA safety standard. The employees had largely ignored the employer's educational and non-coercive efforts to induce compliance. The employers had avoided attempts to enforce through discipline-discharge because they feared such would trigger a walkout, a re-

sult the court found "likely" to occur. Nonetheless, the court affirmed OSHA's view that such speculation would not justify the failure to take "all available legal steps to secure compliance", including discipline, discharge and bargaining with the union for the unilateral right to take these measures. Some individual employers, placed in such a no-win position, might regard that analysis as harsh, but they must succumb to the dominance of that Act. By contrast, a contracting union, confronted with an unlawful strike not of its making, is in a can't-lose position. If it takes "all available legal steps" in good faith, and the strike continues nonetheless, there would be no basis for international union liability unless the contract so provided. And the economic harm falls on the employer and the employees, not the union. In any event, it must be clear that the chances of successfully terminating the strike—which is what this exercise is all about—are considerably greater where coercion on the employee originates with the union and is tempered by the fraternal aspects of unionism than where it originates with the employer who is already the object of the strike.[13]

A different kind of concern, not frequently expressed but real nonetheless, is the risk to judicial authority. When requests for injunctive relief become, of necessity, part of the routine in an industry, each successive grant of relief brings the process closer to the day when the order is regarded with the same disdain as the contract provision

[13] Further, the employer is sometimes the last to know the true nature of the dispute, and seldom knows who first verbalized the thought of a walkout. Employer discipline under these conditions promotes a shot-gun approach which in itself detracts from the chances of success.

being enforced. *Cedar Coal Co.*, supra, presents an example. A strike precipitated by a dispute over a job bidding situation later escalated into a strike against federal injunctions and in support of a union demand that the federal judges in the Southern District of West Virginia "be investigated" because of their alleged habit of siding with the mine operators. 560 F.2d 1158-1160. Federal courts can undoubtedly take care of themselves, but by placing a duty on the contracting union to get its own house in order, the need to rely on the judiciary diminishes as does the risk of eroding its authority.

To summarize, there now exists a gap in the collective bargaining scheme which experience has shown is creating both a substantial impediment to commerce in a vital industry and a significant obstacle to the effectiveness of the bargaining process. Congress intended, in the 1947 amendments, to create and assure union responsibility. At the same time, it endorsed arbitration over economic warfare as the means for resolving contract disputes. That endorsement has become a major factor in labor policy, but its favored place has been ignored by the UMWA and its members in the coal industry. That evasion has been fueled by an asserted absence of legal responsibility. The tools are present to remedy the situation; the need is clear.

POINT II

The UMWA contracts should be impressed with a "reasonable efforts" obligation.

Carbon Fuel's claims rest on the 1968 and 1971 National Bituminous Coal Wage Agreements. The former was examined by the Court in *Gateway Coal.* The terms of the two agreements pertinent to this discussion are essentially the same. The contention here is that "the" agreement may and should be interpreted to impose on the International Union liability for its failure to expend every reasonable effort to prevent or terminate 31 strikes, unlawful under the agreement, engaged in by its locals during the period February, 1969—October, 1973. The court below concluded that "In light of the bargaining history, . . . such an interpretation, in effect rewrites the terms of the contract upon which the parties had agreed." 582 F.2d 1350.

Beginning with the bargaining history, it is relevant to note how the International Union came to bargain a single, national agreement. In its infancy, the 1890's, and for some time thereafter, the Union delegated to its districts the responsibility of negotiating separate agreements with the various employers. Over time the coal operators "pitted District against District to the general detriment of all coal miners and in this manner precluded any wage stability in the industry." *Hodgson,* supra, 344 F.Supp. 996. To eliminate this and other disadvantages, the International, in the 1930's, moved to consolidate power. Following amendments to its constitution, giving it supreme authority over districts and other subordinate bodies,[14] it

[14] As of 1972, 17 of its 23 districts in this country had "provisional" status, a condition tantamount to trusteeship. Defendant District 17 was relegated to provisional status for 48 years, until liberated in 1972 by the decision in *Hodgson,* supra, 344 F.Supp. 994, 995.

assumed the task of negotiating a single, nation-wide collective agreement.

The contract is between the signatory employer and the International "on behalf of each member". Article I.[15] Contract ratification is by the membership, not by delegates. Article 19, Sec. 4, UMWA Constitution. Negotiations for a national agreement are supervised by the "UMWA Bargaining Council", a group consisting of each District president and an International executive board member for each district. Article 19, Secs. 1 through 5, UMWA Constitution.[16] The International's supervision of the contract is pervasive, reaching such minutiae as the layout of a standard grievance form. Article XVII(b)(2) and addendum. Local union existence is scarcely recognized, being referenced less than a half-dozen times in a document exceeding 100 pages.

The contract exudes an enthusiasm for arbitration. In addition to an extremely broad grievance and arbitration procedure covering "any local trouble of any kind" at the mine, including any difference "about matters not specifically mentioned in this Agreement", Article XVII(b), there are procedures tailored for grievances concerning scope of the contract, Article II; safety and health, Article III(h); conditions of imminent danger, Article III(g);

[15] Contract references are to the 1971 National Bituminous Coal Wage Agreement.

[16] "Provisional" status, so widespread among districts as of 1972, meant that the district president was appointed by the International Union as was the district committee which nominated executive board members. *Hodgson,* supra, 344 F.Supp. 995.

discharge, Article XVIII; and employer removal of a Health and Safety Committee, Article III(g). The local union has no role in the processing of grievances; responsibility at the mine level resides in a mine committee consisting of three miners elected by fellow employees. Thereafter, the dispute is handled by a district representative. Article XVII(b). The local union bears none of the costs of arbitration. Article XVII(b)(5). The contract twice asserts the requirement that "an earnest effort shall be made" to settle differences through the specified procedures. Article III(h) and XVII(b). Most significant to this discussion, the parties

> ". . . agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Disputes' article of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, . . ." Article XX.

There is no provision exonerating the International or subordinate bodies or limiting their liability in the event of a strike during contract term.[17]

The court below referenced the covenant "to maintain the integrity of the agreement", but promptly dismissed it

[17] By contrast, the Bureau of National Affairs' all-industries survey shows that 35% of the agreements sampled contain provisions limiting the contracting union's liability for violation of a no-strike pledge. "Some form of positive action usually is required of the union to avoid liability". 2 Collective Bargaining—Negotiations and Contracts, (BNA) 77:4.

as insignificant to the liability question. It retreated to the rule of *Haislip,* which involved only a single strike and which hinged liabilty to those responsible for instigating, supporting or ratifying the strike. But the "integrity" covenant goes beyond conduct prohibited by *Gateway* and bespeaks a separate duty which is not satisfied simply by refraining from prohibited conduct. It begins with the specific promise by the International to make "earnest efforts to settle differences" promptly. It looks to the role of the International Union as contracting party, the historical reasons for that role, the benefits gained by the union from it and the resulting pre-emption of local union authority and responsibility. It recognizes the manifest reliance upon multiple, peaceful procedures for settlement of all manner of local disputes. Quite simply, it is virtually the only consideration flowing from the union to the employer supporting a myriad of employer promises, including the surrender of decision making to a third party. Did the employers bargain for naught? By reserving International liability to active participation in the strike itself, and refusing to recognize any other basis for liability, the court has effectively withdrawn the integrity covenant, notwithstanding its asserted unwillingness to rewrite the parties' contract. The court gave greater weight to its view of bargaining history than to the bargain itself. In an industry especially troubled by unlawful strikes, it cannot be doubted that the employers—and the union—contemplated that the integrity covenant was of the essence of the agreement, there being no other expression of employer protection. The "essence" factor, and the plain congressional requirement that the union, the employees and the employer "shall exert every reasonable effort to . . . maintain"

promised working conditions, combine to impose on the International a positive duty to do just that. What the statute and the contract say should control, rather than be negated by the vagaries of a bargaining history which has already been deemed largely irrelevant to Section 301 concerns.[18]

Equally unpersuasive is the Fourth Circuit's observation that the contract contained no indemnity obligation making the International liable for unlawful strikes.[19] There is, in fact, no exculpatory clause either. It is a clean slate, precisely the situation existing in *Wiley, Lucas Flour, Nolde, Needham* and *Gateway,* supra. In each of those cases, it was made clear that the preferred policy of arbitration, would prevail in the absence of an express contract provision clearly articulating an exception to that policy.

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[18] The unions argued in *Gateway* that a no-strike pledge could not be implied because the 1968 National Agreement, then under examination, had expressly rescinded the no-strike provisions contained in two earlier agreements. In a footnote disposition, the Court said that such rescission "does not, however, purport to negate any no-strike duty created by the present agreement", which duty, the Court said, arises from the presence of arbitration as the exclusive means for dispute resolution. 414 U.S. 384 n. 15. The same reasoning should dispose of the Fourth Circuit's analysis which found significant the rescission of earlier no-strike provisions, as well as the deletion, beginning in the 1950's, of a "best efforts" provision found in several prior agreements. Not only is there no language in the instant agreements rescinding the "best efforts" obligation, there is affirmative language requiring earnest efforts and maintenance of the integrity of the contract.

[19] The NLRB has held that an employer proposal to obtain an indemnity clause is not a mandatory subject of bargaining. *Hall Tank Company,* 214 NLRB 995 (1974) and cases cited therein.

Throughout the course of 31 unlawful strikes, Carbon Fuel has been deprived of the benefit of its bargain. Yet for every employer decision which precipitated one of these strikes, the company was duty bound to let a third party review, and perhaps reverse, its actions. Such third party review is essential to the International's need for uniformity in the application of the agreement. A national contract, left to be enforced only through strike action, would soon lose all semblance of uniformity. The International would be returned to the early days when strength of the individual employer and zeal of local union members were determinative. That was found unsatisfactory, and thus was forsaken by the International in favor of uniformity. Arbitration was extracted from the employer as the means of preserving that uniformity. In turn, the law imputed the duty not to strike. At stake now is not only the integrity of the parties' agreement, but the integrity of the policy favoring arbitration. The International has pledged its integrity. Judicial action should require that that pledge be enforced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1183

CARBON FUEL COMPANY,

Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT NO. 17, UNITED MINE WORKERS OF AMERICA, and LOCAL UNIONS NOS. 6572, 7626 and 2236, UNITED MINE WORKERS OF AMERICA,

Respondents.

BRIEF ON BEHALF OF THE GLASS BOTTLE BLOWERS ASSOCIATION OF THE UNITED STATES AND CANADA, AFL-CIO, AS AMICUS CURIAE.

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INTEREST OF THE AMICUS CURIAE.

The Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, is an unincorporated labor organization of international scope which represents approximately 80,000 employees primarily in the glass industry. In such capacity, this international union conducts negotiations and enters into collective bargaining agreements for and on behalf of both the international union and its constituent local unions. Because of its direct role in collective negotiations, the question presented in the instant matter is of vital concern.

The conduct of the affairs and functions of the international union require that it have some certainty as to the scope of its liability under collective bargaining agreements it is party to. While the international conducts negotiations and enters into agreements with employers, it has no day-to-day involvement in either the operation of local union affairs or in the enforcement of agreements. The international union undertakes contractual obligations only within the traditional agency doctrine and with the understanding that the contractual terms are as bargained for during the process of collective negotiations.

Any implication that additional terms to these agreements might be found to exist as a matter of law would not only have a devastating effect upon traditional notions of collective bargaining and destroy the balance of economic power upon which Congress founded the national labor legislation, but would also call for a drastic restructuring of international unions. These are the concerns of the Glass Bottle Blowers Association of the United States and Canada, AFL-CIO which have caused this labor organization to submit this brief amicus curiae.

SUMMARY OF ARGUMENT.

The decision of the Fourth Circuit must be affirmed. A parent labor organization should not be held liable for breach of a no-strike clause by a local union where there is no evidence that the parent organization adopted, instigated, encouraged, supported or ratified any work stoppage in violation of the contract. To imply as a matter of law an "all reasonable means" requirement in a no-strike clause would be to rewrite the terms of the agreement negotiated by the parties and would constitute a dangerous intrusion into the traditional balance of power in the labor sphere in contravention of national labor policy. To suggest that additional terms may be implied in collective bargaining agreements would also foster, we submit, an atmosphere inimical to the interests of industrial peace.

ARGUMENT.

Point I.

The Terms of the Collective Bargaining Agreement Set Forth the Scope of Liability for Breach and the Court Must Defer to the Contractual Undertaking of the Parties.

In allocating liability for breach of a no-strike clause in a collective bargaining agreement, a Court is bound by the terms of the parties' agreement.

The right to strike has been recognized and sanctioned as concerted activity protected by the federal labor laws. *NLRB v. Erie Resistor Corp.*, 373 U. S. 221 (1963). This right may be bargained away in the process of collective negotiation. While national labor policy has held that a no-strike obligation is implied in a collective bargaining agreement where there is contractual provision for the resolution of disputes through grievance-arbitration procedures, *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1957), the courts have gone no further in implying either the existence of a no-strike clause or the nature or scope of such. To do so would constitute too great an intrusion into the collective bargaining process.

In fact, the Court has upheld the statutory right to engage in an unfair labor practice strike despite a contractual non-strike clause. *Mastro Plastics Corp. v. NLRB*, 350 U. S. 270 (1956). Furthermore, Courts have held that the basic statutory right to engage in a sympathy strike is not forfeited by a contractual no-strike clause unless there is a specific waiver of this right. See, e.g., *NLRB v. C. K. Smith*, 569 F. 2d 162 (1st Cir. 1977); *Gary Hobart Water Co. v. NLRB*, 511 F. 2d 284 (7th Cir. 1975). Thus courts have never decreed that by merely achieving a no-strike promise in a collective bar-

gaining agreement, an employer is entitled to a guarantee that there will be no work stoppages of any nature whatsoever. What these cases indicate, to the contrary, is that the relationship between the employer and its employees is defined by the provisions of the contract, and courts must give deference to that contract.

Not only are Employers not unconditionally entitled to a no-strike clause in a collective bargaining agreement, they are not entitled, as a matter of right, to have a parent organization, solely because it is a party to the contract, held strictly liable for breach. The nature and scope of the no-strike promise, including liability, is achieved through negotiations.

The Circuit Courts that have dealt with this issue have recognized this proposition. The Third Circuit in *Eazor Express Inc. v. International Brotherhood of Teamsters*, 520 F. 2d 951 (3rd Cir. 1975), *cert. den.*, 425 U. S. 908 (1976), (hereinafter *Eazor*), very specifically noted its limited role in remaking the terms to which the parties had agreed:

> It is true, of course, that the courts may not remake the parties' contract and may declare an implied obligation to exist only where there is a satisfactory basis in the express provisions of the agreements which make it necessary to imply certain duties and obligations in order to effectuate the purposes of the parties. *Id.* at 960.

The Court cited to *Kellogg Company v. NLRB*, 457 F. 2d 519, 524 (6th Cir. 1972), *cert. den.*, 409 U. S. 850 (1972) which had held:

> Courts cannot make contracts for the parties and can declare implied obligations to exist only when there is a satisfactory basis in the express provisions of the agreements which make it necessary to impose certain duties and obligations in order to effectuate the purposes of the parties. Before an obligation will be implied it must appear from the Contract itself that it was so clearly in the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, citing to *Refinery Employees' Union v. Continental Oil Company*, 160 F. Supp. 723 (W. D. La. 1958).

Such holdings are in accordance with traditional notions of contract law in which the role of the court is to effectuate the intentions of the parties.

Traditional contract law is based upon the mutual assent of the parties to all material terms of the agreement. *Crosby v. Paul Hardeman, Inc.*, 414 F. 2d 1, 7 (8th Cir. 1969). It has been said that "a contract cannot be implied, in fact, against the intention or understanding of the parties." *Jamaica Savings Bank v. Lefkowitz*, 390 F. Supp. 1357, 1361 (E. D. N. Y. 1975). Implied contracts are not favored in the law. See, e.g., *Fraser Sweatman, Inc. v. Schreiber*, 291 F. Supp. 276 (E. D. Pa. 1968). These basic tenets of freedom of contract are no less viable in the labor arena.

The Fourth Circuit's decision in *Carbon Fuel*, a reaffirmation of its earlier decision in *United Construction Workers v. Haislip Baking Co.*, 223 F. 2d 872 (4th Cir. 1955), *cert. den.*, 350 U. S. 847 (1956), adheres to these principles. In *Haislip*, the Court noted its proper role in looking to the contract language to ascertain whether more than the application of ordinary principles of agency had been agreed to in assessing liability for breach of the no-strike clause.

> There is nothing in the contract making defendants liable for "wildcat" strikes or requiring that they take any action with regard to them.

We submit that the language of the agreement between the parties is the proper focus in determining the scope of liability and that this has, in fact, been the touchstone of the decisions in other circuits on this issue.

The Third Circuit Court of Appeals in *Eazor Express, supra*, arguably had sufficient express contractual language upon which to imply the "all reasonable means" theory of liability. In that case the parties' no-strike clause expressly provided that there would be no strike "without first using all possible means of settlement as provided for in [the] Agreement . . ." *Id.* at 955. Further, one of the supplemental agreements before the court required, in specific contract language, that the Union "undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work." *Id.* at 962. Finally, the contract in *Eazor*, in its exculpatory provisions, limited the liability of the Union only for any unauthorized acts of job stewards. *Id.* at 961.

The Third Circuit had another occasion to rule on this issue in *United States Steel Corp. v. United Mine Workers*, 534 F. 2d 1063 (3rd Cir. 1976). In that case the employees of Plaintiff corporation engaged in a wildcat strike in violation of an implied no-strike clause. The issue before the court was the propriety of injunctive relief prospectively enforcing the implied no-strike provision. The Court, in finding an obligation on the part of the unions to employ reasonable efforts to induce its members to return to work, again relied on specific contractual language. The collective bargaining agreement in *U. S. Steel*, imposed, in express language, a duty on the union to "maintain the integrity of the contract." *Id.* at 1073.

Similarly, in *Penn Packing Co., Inc. v. Amalgamated Meat Cutters, Local 195*, 497 F. 2d 888 (3rd Cir. 1974), the court premised its finding of a "best efforts" duty on the following contract language:

> The union for itself and for its individual members agrees and *guarantees* that there shall be no strike, stoppage of work, slowdown, or other interference with production. (emphasis added) *Id.* at 890.

Republic Steel Corporation v. United Mine Workers of America, 570 F. 2d 467 (3rd Cir. 1978), relied upon by Petitioner, is factually and legally distinguishable. The issue presented in that case was whether the International Union *could* be held liable for damages where UMWA local union members illegally picketed an employer, thus causing Republic Steel's employees to engage in a sympathy strike. The Court, in remanding the case, noted that:

> An implied obligation to take reasonable steps to prevent the spread of unlawful strikes can be imposed only to the extent that it can be exercised. *Id.* at 478.

It must also be noted that in *Republic Steel*, the local, sub-district and district unions were all exculpated entirely of any liability for the work stoppages.

Other courts which have been presented with this issue have refused to expand the scope of liability for contractual breach beyond the traditional doctrines of agency in the absence of express contractual language to the contrary. The Fifth Circuit in *United States Steel Corp. v. United Mine Workers*, 519 F. 2d 1249 (5th Cir. 1975), *rehear. den.*, 526 F. 2d 376 (5th Cir. 1976) refused to hold a union responsible for the unauthorized acts of its members, citing *Central Appalachian Coal Company v. United Mine Workers*, 376 F. Supp. 914 (S. D. W. Va. 1974). In *Central Appalachian Coal*, the court held that to hold a union liable for the breach of a no-strike obligation it would have to find that "an authorized union agent

acted in a manner tending to instigate, encourage, condone or otherwise support the breach activity." *Id.* at 922-923, the traditional restatement of the agency doctrine.

> Nothing in the bargaining agreement requires the union to discipline its members for participating in an unauthorized strike, and we cannot impose this duty as a matter of law. *United States Steel Corp.* at 1255.

Similarly the Sixth Circuit in the case of *Southern Ohio Coal Co. v. United Mine Workers,* 551 F. 2d 695 (6th Cir. 1977) explicitly rejected the proposition that a union may be held responsible for failure to use its "best efforts" in curtailing an unauthorized strike. *Id.* at 701.

Accordingly, the decision of the Fourth Circuit in *Carbon Fuel,* defers to traditional notions of contract interpretation, adhered to consistently in the circuits, by appropriately declining to rewrite the terms of the contract to which the parties had agreed.

Point II.

National Labor Policy Will Be Ill-Served if the Terms of a Collective Bargaining Agreement Are Set by Other Than the Parties to the Agreement.

It is undisputed that federal labor legislation was enacted with the express intent that labor peace be achieved through the process of collective negotiation. Labor-Management Relations Act, 29 U. S. C. 141 et seq.

As the Court held in *NLRB v. Insurance Agents' International Union,* 361 U. S. 477 (1960), the legislative history of the National Labor Relations Act, as amended, indicates that it was the intent that contractual terms and conditions of employment be agreed to at the bargaining table and that the National Labor Relations Board refrain

from settling the terms of the agreement. The policy behind such a holding—that "such an approach from both sides of the table promotes the overall design of achieving labor peace" leads to the clear inference that courts, likewise, should refrain from regulating the substantive terms of the agreement,

> . . . Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.

See also *Teamsters Union v. Oliver,* 358 U. S. 283 (1959).

To permit a court to imply substantive terms in a collective bargaining agreement is also inimical to the concept of industrial peace. A basic tenet of collective bargaining is that the expectations of each party are incorporated, at the bargaining table, into an agreement which not only sets the terms of the employment relationship but removes the element of uncertainty about the parameters of that relationship. A court implied term which is not soundly based in the agreement is in complete derogation of the stated objective in federal labor policy of promoting industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. *NLRB v. American National Insurance Co.,* 343 U. S. 395 (1952).

While it is certainly true that arbitration is favored as the means for resolving disputes between parties to a collective bargaining agreement, see, *United Steelworkers of America v. American Manufacturing Co.,* 363 U. S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U. S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U. S. 593 (1960), courts have traditionally declined to require an Employer to utilize the arbitration forum to re-

solve issues of breach of the no-strike clause absent specific contractual language indicating that such was the intent of the parties. See, e.g., *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238 (1962). Such a holding clearly reemphasizes that the appropriate focus of courts is on the specific terms of the parties' agreement in determining contractual rights and obligations. It also necessarily follows that basic inequities would result in implying extra-contractual obligations on the part of a parent labor organization for breach of a no-strike clause while continuing to deny them the forum which has been judicially sanctioned as being peculiarly appropriate for the resolution of labor disputes.

Finally, court imposed liability on an international labor organization would constitute an impermissible intrusion into the day-to-day affairs of the labor organization. Until the passage of the Landrum-Griffin Act of 1959, there was a general aversion to the courts intervening in intra-union affairs. While Landrum-Griffin regulates certain areas of union activity, it does not dictate the manner in which labor unions conduct negotiations nor specify any actions that must be taken in a given situation. In fact, courts have recognized that labor unions enjoy a broad area of discretion in the conduct of their affairs. See, e.g., *Vaca v. Sipes*, 386 U. S. 171 (1967).

To imply an "all reasonable means" standard into a no-strike clause would inevitably require international unions to restructure their organizations. In a situation such as this case, an international union would be faced with only two alternatives: to either refrain from participating in negotiations and being a party to a collective bargaining agreement and thus depriving its constituent locals of one of its most important functions, or relinquish a great deal of discretion in its relationship with its locals. Neither alternative advances the interests of labor peace or the statutorily guaranteed rights of employees.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: August 1, 1979

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AUG 7 1979

No. 78-1183

IN THE

Supreme Court of the United States

October Term, 1978

CARBON FUEL COMPANY,

Petitioner,

v.

UNITED MINE WORKERS OF AMERICA;
DISTRICT 17, UNITED MINE WORKERS
OF AMERICA; AND LOCAL UNIONS NOS.
6572, 7626 AND 2236, UNITED MINE
WORKERS OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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Respondents.

ON WRIT OF CERTIORARY TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), having failed to secure the consent of all parties to the above noted case, hereby moves for leave to file a brief *amicus curiae* in support of the respondents' position.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 104 national and international unions having a total membership of approximately 13,750,000 working men and women. These unions devote

their main energies to the practice and procedure of collective bargaining including the consummation of collective agreements. This case concerns the proper construction of the arbitration and no strike clauses that are common in such agreements. Accordingly, this proceeding is of substantial moment to the AFL-CIO and its affiliates.

ISSUES TO BE COVERED IN THE AFL-CIO'S BRIEF

The parties, quite properly, will concentrate on the particular collective agreement involved and its bargaining background. In contrast the brief sought to be filed is devoted to two more general propositions of law central to the question presented: First, that the national labor policy does not include a Congressional determination that unions are to police unauthorized breach of contract strikes generally, or such strikes over arbitrable disputes in particular. Second, that the policy of free collective bargaining confines the courts' authority to imply contractual duties to instances in which the implied obligation does not add to the express undertakings in the agreement but rather is inherent those undertakings fairly understood.

CONCLUSION

For the above stated reasons this motion should be granted.

Respectfully submitted,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Carbon Fuel contends: "A union bound by a collective bargaining agreement containing an express or implied no-strike clause has the obligation without more, to use all reasonable means to prevent and end strikes by its members and subordinate branches in violation of that

clause." (Pet. Br. 20 (Heading).) This statement leaves no doubt that the "obligation" sought to be imposed is, in Professor Corbin's instructive dichotomy, not "implied in fact"—*viz.* "found by interpretation of a promisor's words or conduct"—but " 'implied in law' * * * [—*viz.* a] legal duty created otherwise than by assent and without any words or conduct that are interpreted as promissory." (3 Corbin, Contracts, § 561.)

The courts' authority in enforcing a collective agreement to create such an implied obligation is a matter of "federal law * * * fashion[ed] from the policy of our national labor law" (*Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456). That policy does not, as we show in part A of our argument, include a Congressional determination that unions are to police unauthorized breach of contract strikes generally, or such strikes over arbitrable disputes in particular. Moreover, as we show in part B, *Howard Johnson* v. *Hotel Employees,* 417 U.S. 249, demonstrates that the policy of free collective bargaining confines the authority to imply contractual duties to instances in which the implied obligation does not add to the express undertakings in the agreement but rather is inherent in those undertakings fairly understood—*viz.* to instances in which the express promise is " 'instinct with an obligation' imperfectly expressed." (*Wood* v. *Lucy, Lady Duff-Gordon,* 222 N.Y. 88, 90, 118 N.E. 214 (Cardozo, J.).)

ARGUMENT

(A). The petitioner argues that where a collective agreement contains an arbitration or no-strike clause, "the policy of our national labor law" (*Textile Workers* v. *Lincoln Mills,* 353 U.S. 448,456) mandates an obligation implied in

law on the union to use all reasonable means to end unauthorized strikes in violation of the agreement. The petitioner misunderstands the national labor policy.

This Court has recognized that the 1947 Congress in enacting the Labor-Management Relations Act sought to promote numerous policies, and that the legislature did not push any of these to the limits of its own logic—partly because to do so would have undermined competing policies and partly because the dynamics of the legislative process in the face of a predictable Presidential veto necessitated compromise. (See, *e.g., Carpenters' Union* v. *Labor Board,* 357 U.S. 93, 99-100; *Machinists* v. *Labor Board,* 362 U.S. 411 n. 7, 428; *Pipefitters* v. *United States,* 407 U.S. 385, 409; *Florida Power and Light Co.* v. *Electrical Workers,* 417 U.S. 790.) A particularly valuable statement is that of Mr. Justice Harlan in *Machinists, supra,* 362 U.S. at 428:

> It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act" is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it.

It is essential therefore to identify the means which Congress chose to prevent and remedy strikes in breach of contract and also to consider whether the implication of a contractual duty on unions to utilize all reasonable means to end a work stoppage which it has not authorized, participated in or ratified conflicts with other policies which Congress sought to effectuate. Accordingly, we now show that Congress devoted careful attention to the problem of strikes during the term of collective agreements, and in the Taft-

Hartley Act adopted methods for avoiding such strikes which do not include creation of such a contractual duty.

(1) The first and most important provision adopted by Congress in order to maintain industrial peace during the term of a collective agreement is, of course, § 301(a), which provides that such agreements shall be judicially enforceable. The Court's opinion in *Lincoln Mills, supra,* 353 U.S. at 453-454 sets out in full the pertinent discussion in the Senate[1] and House Reports.[2] The passages from the Senate Report relied on by petitioner and its supporting *amici curiae* state that the adoption of a no-strike clause is highly desirable, and that if collective agreements are to "stabilize industrial relations" they must be enforceable aganst both employers and unions; but these universally acknowledged propositions do not significantly advance their position. And the concluding paragraph of this section of the Senate Report (entitled "Enforcement of Contract Responsibilities"[3]) makes clear that Congress' intent was to *encourage* but *not to mandate* the adoption of no-strike agreements:

> Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.
>
> It has been argued that the result of making collective agreements enforceable against unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract.
>
> This argument is not supported by the record in the few States which have enacted their own laws in an effort to secure some measure of union responsibility for breaches of contract. Four States—Minnesota, Colorado, Wisconsin, and California—have thus far enacted such laws and, so far as can be learned, no-strike clauses have been continued about as before.
>
> *In any event, it is certainly a point to be bargained over* and any union with the status of "representative" under the NLRA which has bargained in good faith with an employer should have no reluctance in including a no-strike clause if it intends to live up to the terms of the contract. The improvement that would result in the stability of industrial relations is, of course, obvious.[4]

To effectuate § 301(a), Taft-Hartley declared in § 301(b) that any (covered) union "shall be bound by the acts of its agents" and "may sue or be sued as entity"; in §§ 301(c) and (d) provided for venue and process in such suits; and in § 301(e) provided also that the common law of agency shall govern "in determining whether one person is acting as an 'agent' for another person". By subjecting labor organizations to suit as entities and by applying to them the common law doctrine of *respondeat superior* just as if they were corporations, Congress determined that contractual obligations of labor organizations were to be enforceable against unions according to the principles laid down by Chief Justice Taft in the *Coronado Coal* cases:

> In our previous opinion we held that a trades union, organized as effectively as this United Mine Workers' organization was, might be held liable, and all its funds

[1] S. Rep. No. 105, S. 1126, 80 Cong., 1st Sess., 15-18 (hereinafter cited as S. Rep.) I Legislative History of the Labor Management Relations Act, 1947, pp. 421-424 (hereafter cited as Leg. Hist.).

[2] H. Rep. No. 245, 80th Cong., 1st Sess., p. 6, I Leg. Hist. 297.

[3] S. Rep. 15, I Leg. Hist. 421.

[4] S. Rep. 17-18, I Leg. Hist. 423-424, emphasis added. The quotation at Chamber of Commerce Br. 11 elides the emphasized portion.

> raised for the purpose of strikes might be levied upon to pay damages suffered through illegal methods in carrying them on; but certainly it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association.[5]

But Congress did not take the more drastic step of imposing vicarious liability on unions for acts that under common law principles are unauthorized. In explaining § 301(e) (and the parallel § 2(13) in Title I of the bill (dealing with unfair labor practices)), Senator Taft said:

> What is a labor organization? It is an organization with officers, exactly like a corporation.
>
> I admit it may be difficult to prove the responsibility of a union. It is sometimes difficult to prove in the case of an employer. If the wife of a man who is working at a plant receives a lot of telephone messages, very likely it cannot be proved that they came from the union. There is no case then. There must be legal proof of agency in the case of unions as in the case of corporations; * * *.[6]

This treatment of the problem of vicarious responsibility provides an excellent example of Congress' "adjustment and compromise of competing interests which in the abstract * * * may seem irreconcilable." (*Machinists, supra.*) On the one hand, Congress wanted to do away with the very loose test of responsibility under §2(2) of the original NLRA whereby the term "employer" included "any person acting in the interest of an employer"; Congress

[5] *Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295, 304-305.

[6] 93 Cong. Rec. 4022, II Leg. Hist., 1926. Compare Chief Justice Taft in *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 395.

also wanted to alleviate the difficulties of establishing union responsibility under § 6 of the Norris-LaGuardia Act which requires proof of "actual instigation, participation or ratification".[7] Congress resolved this problem by uniformly adopting the common law test of agency as the measure of both union and employer responsibility.[8]

(2) Thus, § 301 imposes on unions liability for strikes in breach of contract for which they are responsible according to the common law rule of agency—that is, strikes which they have authorized, participated in or ratified. Congress did not thereby leave employers without remedy for unauthorized strikes. Taft-Hartley dealt with this problem not by imposing liability upon unions, but by making clear the *employer's* authority against the employees who engaged in that unauthorized activity. The 1947 amendments explicitly affirmed the common law right of the employer to discharge (or otherwise discipline) an employee who engages in a strike in breach of contract. This was accomplished by an amendment to § 13 of the NLRA preserving "the limitations or qualifications on [the] right" to strike.[9] One of these "limitations or qualifications" is the rule of *Labor Board* v. *Sands Mfg. Co.*, 306 U.S. 332, 344 that the NLRA does not prohibit an effective discharge for "repudiation by the employe of his agreement," any more than it prohibits such discharge for a tort committed against the employer. Likewise, in discussing § 7 of the Act the conferees declared their emphatic approval of the *Sands* case and

[7] 93 Cong. 6858, II Leg. Hist., 1622.

[8] See particularly Senator Taft's explanation of the conference agreement, 93 Cong. Rec. 6858, II Leg. Hist., 1622 which is quoted in full *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, 878-879 (C.A. 4), *cert. denied*, 350 U.S. 847.

[9] See *Labor Board* v. *Drivers Union*, 362 U.S. 274, 281.

of two then recent Labor Board cases which expanded upon *Sands*.[10]

(3) At the same time that Congress was reaffirming the authority of employers to discipline workers who engage in strikes in breach of contract, it reduced the effective authority of unions over these employees. As stated in *Radio Officers* v. *Labor Board*, 347 U.S. 17, 40-41, "the policy of the Act is to insulate employees' jobs from their organizational rights" by "withholding from unions the power to cause the discharge of employees for any other reason" than to compel payment of union dues and fees. Thus, "§§ 8(b)(1), 8(b)(2), 8(a)(1), 8(a)(2) and 8(a)(3) form a web, of which § 8(b(1)(A) is only a strand, preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rules." [11]

These restrictions on unions were adopted in response to the strong feeling of the proponents of the 1947 amendments that union officials had obtained too much power over their rank and file members and over employees generally. In describing "the philosophy" on which the 1947 changes in the NLRA were based, Professor Cox wrote:

> Doubtless one reason for the violence of reaction of organized labor to the Taft-Hartley amendments is the realization that they are rooted in the view that union and employees are not one.[12]

[10] See Sen. Taft's summary of the conference agreement, 93 Cong. Rec. 6442, II Leg. Hist., pp. 1538-1539; House Conf. Report No. 510 on H.R. 3020, 38-39, I Leg. Hist., 542-543; see also *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 280 and *id.* at n. 10.

[11] *Scofield* v. *NLRB*, 394 U.S. 423, 428-429. See also *Labor Board* v. *General Motors*, 373 U.S. 734, 742-743; *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 184-185.

[12] Cox, *Some Aspects of the Labor Management Relations Act of 1947*, 61 Harv. L. Rev. 1, 45, 47 (1947).

And in the concluding portion of the same article Professor Cox accurately prophesied the effect of this enactment on the problem of unauthorized strikes:

> The most disturbing aspect of Section 8(a)(3), however, is the provision making it an unfair labor practice to discharge an employee pursuant to an authorized union shop agreement for any reason other than non-payment of dues. By depriving the majority representative of power to expel from the plant individuals seeking to undermine its position, this provision encourages the growth of the dissident groups and dual unionism that breed jurisdictional strife. By depriving the union of its most effective means of disciplining workers who disregard their obligations under a collective agreement, the provision also disables the union from accepting responsibility for the employees' observance of the other terms of a collective agreement. For example, under a true union shop arrangement, a labor union could take effective action to halt wildcat strikes. It could order the men back to work and, if they disobeyed, suspend or expel them, thus bringing about their lay-off or discharge. *Under Sections 8(a)(3) the back-to-work order would be an empty gesture, for the union would have no effective sanction by which it could be enforced.* Under such circumstances it is unlikely that unions will voluntarily accept any responsibility for the conduct of the employees they represent.[13]

Congress further disabled unions from policing no-strike provisions against the employees by restricting their ability to insist on their becoming and remaining union members. The union has no control whatever over employees who are not its members. And the Act does not require those repre-

[13] Cox, *Some Aspects of the Labor-Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 298-299 (1948) (emphasis added).

sented to become members of the representative; it merely permits unions to bargain with the employer for an agreement whereunder the employees are required to pay union dues and other fees. Further § 14(b), also adopted in 1947, forbids unions from even bargaining for such a provision in states where this is contrary to law.[14]

(4) The foregoing description of what Congress did and did not do in 1947 makes clear that while the legislature was "interested in promoting collective bargaining that ended with agreements not to strike" [15] the problem of unauthorized strikes was dealt with not by establishing a contractual duty of unions to end such strikes "but through a completely different legislative route".[16]

The mutual obligations of the parties to collective agreements were to be strengthened by making such agreements enforceable in federal court and by providing that unions could both sue and be sued as entities. Unions were to be "bound by the acts of their agents", applying common law rules of agency which take the middle ground between the standards of the Wagner Act and of § 6 of the Norris-LaGuardia Act. The close interrelationships between these provisions precludes attributing to Congress an intent to impose liability for a breach of a

[14] Subsequent legislation has gone even further in limiting union authority. For when Congress, in 1959 undertook the regulation of the internal affairs of labor organizations—a step it had declined to take in 1947—it established *inter alia* that a member may not be disciplined without a prior hearing. Labor Management Reporting and Disclosure Act of 1959, § 101(a)(5), 29 U.S.C. § 411(a)(5).

[15] *Lincoln Mills, supra,* 353 U.S. at 452.

[16] Cf. *Florida Power & Light Co.* v. *Electrical Workers,* 417 U.S. 790, 807.

no-strike promise on a union which has not been found responsible therefore under common law agency principles.

Further, unauthorized strikes were to be deterred and remedied by vindicating the employer's authority to discharge or discipline the employees who are guilty of the breach. That Congress looked to the *employer* to protect himself in this manner, rather than to the disciplinary authority of the union that is party to the agreement is left beyond doubt by Congress' simultaneous action in disabling unions from compelling an employee's discharge except for nonpayment of dues thereby removing their effective power over employees.

Accordingly in *United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872 (C.A. 4), *cert. denied,* 350 U.S. 892, Chief Judge Parker both confirmed the employers' right to discharge "wild cat" strikers, and held that the unions' liability for such strikes depends not on "whether they did everything they might have done but [on] whether they adopted, encouraged or prolonged the continuance of the strike" (*id.* at 877-878).[17]

[17] The Court of Appeals affirmed the judgment against the defendant locals on the theory that "all of the members of the defendant locals, including their officers, participated in the strikes * * *" (582 F.2d 1346, 1350). In so ruling, that court expressed approval (*id.* at 1349) of a "mass action theory of responsibility" which originated in *United States* v. *International Union, U.M.W.A.,* 77 F.Supp. 563 (D.C.D.C.) and which was an alternative ground for imposing liability on the defendants in *Eazor Express Inc.* v. *International Brotherhood of Teamsters, et al.,* 520 F.2d 951 (C.A.3), *cert. denied,* 424 U.S. 935. It should be noted that the Fourth Circuit's conclusion that the theory is sound only when "properly applied"—which apparently means, where, as here all the members of the union participate in the illegal strike—is a substantial modification of the *Eazor* court's decision which im-

(B) (1). What has been said thus far demonstrates, we believe, that there is no basis for the petitioner's contention

posed liability on a "mass action theory" where the strike engaged in by "all members of a union *employed by a given employer*" (520 F.2d at 963, emphasis added). In *Eazor* this meant that only 200 of one Local's approximately 10,000 members and 355 of the other Local's approximately 6,500 members subjected their unions' treasury to judgments of $655,793 and $366,786 respectively; and that 1/40 of 1% of the IBT's total membership subjected the IBT to a judgment of over one million dollars. Because no party has sought review of the "mass action" aspect of the ruling below, it is not presently before the Court, and we anticipate that the Court will not address itself to that issue. However, out of an abundance of caution, due to the importance of the issue, we shall state briefly why we believe that the "mass action theory" is fundamentally inconsistent with the statute as a basis for imputing liability to a labor organization, certainly as stated in *Eazor* and perhaps as applied below in this case.

The controlling legislative materials are those which we have already discussed, namely §§ 301(b) and (e) wherein Congress determined that unions would be liable only for the acts of their "agents" according to the common law. (See pp. 5-7, *supra*.) Senator Taft twice gave the most explicit assurance possible that union's would not be held responsible for the actions of their members. See 93 Cong. Rec. 4022, II Leg. Hist. 1026-1027 quoted at p. 6, *supra;* 93 Cong. Rec. 5214, II Leg. Hist. 1204-1205.

> I think the word "agent" used here, as used in the contract section, and as used in other places in the bill, means an agent under the ordinary rules of agency, an agent of the labor union, the organization, as such. The fact that a man was a member of a labor union in my opinion would be no evidence whatever to show that he was an agent.

The foregoing leaves no room under the LMRA for imposing liability on unions on the "premise" that "large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members." (*Eazor*, *supra*, 520 F.2d at 963.) Even if it is to be accepted as an immutable truth, subject to judicial notice, that men do not act without leaders, it is still a matter of proof wheher in a particular

that the 1947 Congress expected unions to end unauthorized breach of contract strikes. But even if there were room for disagreement on that point it would *not* follow that such an obligation may properly be implied in law from an arbitration or no-strike clause. For the policy of free collective bargaining imposes narrow limits on the courts' power to make such implications. That policy originated in the Wagner Act and was emphatically reaffirmed in § 8(d) of the 1947 Amendments. This history was fully and authoratitively detailed by Mr. Justice Black in *Porter Co.* v. *NLRB*, 397 U.S. 99, 104-106; (footnotes omitted; emphasis supplied.)

> The object of [the Wagner] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the

work stoppage those leaders are the officers and agents chosen and authorized to act by the union *rather than ad hoc leaders whose illegal acts generated a spontaneous following among the men.* Only for the acts of the former has Congress subjected unions as entities to liability. Neither the *Eazor* court nor any of the other courts which have adopted the "mass action" theory has mentioned § 301(e), or Senator Taft's explanation thereof; they did not even stop to consider whether by its action Congress has withdrawn from the courts the authority to impose liability on some judicially created theory. These courts have also disregarded the federal law of agency as declared in the *Coronado* cases, see pp. 5-6, *supra*. While it presents a much closer question than that presented in *Eazor*, even the spontaneous illegal action of *all* the members of an organization is not action of that organization's "agents in accordance with their fundamental agreement of association" (*Coronado, supra*, 268 U.S. at 304) and should not be a basis for liability of the organization which, as an institution, has a separate existence from those who are its members *at any given time.*

passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agrement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act. The Senate Committee on Education and Labor stated:

> "The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory."

The discussions on the floor of Congress consistently reflect this same understanding. * * * In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court said:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *Id.*, at 45.

In 1947 Congress reviewed the experience under the Act and concluded that certain amendments were in order. In the House committee report accompanying what eventually became the Labor Management Relations Act, 1947, the committee referred to the abovedquoted language in *Jones & Laughlin* and said:

> "Notwithstanding this language of the Court, the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . .
>
> "[U]nless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements."

Accordingly Congress amended the provisions defining unfair labor practices and said in § 8(d) that:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.*"

Porter was followed in *NLRB* v. *Burns Security Services*, 406 U.S. 281-284, 287. The Court there observed that § 8(d) made the policy ennunciated in *Jones & Laughlin, supra*, "an express statutory mandate" (406 U.S. at 283). And *Howard Johnson* v. *Hotel Employees*, 417 U.S. 249 in turn followed *Porter* and *Burns*. The *Howard Johnson* Court

met and rejected the contention that § 8(d) (and thus the rule of the *Burns* case) was applicable only to the NLRB:

> Although this distinction was in fact suggested by the Court's opinion in *Burns, we do not believe that the fundamental policies outlined in Burns can be so lightly disregarded.* In *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957), this Court held that § 301 of the Labor Management Relations Act authorized the federal courts to develop a federal common law regarding enforcement of collective-bargaining agreements. But *Lincoln Mills did not envision any free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements.*[18]

Howard Johnson thus teaches that courts must be circumspect in defining obligations under a collective agreement lest they subvert the fundamental policy of free collective bargaining.[19]

(2) Such judicial restraint is entirely consistent with the rule of *Teamsters Union* v. *Lucas Flour,* 369 U.S. 95. In that case the parties entered into a collective agreement containing an arbitration clause, an arbitrable dispute thereafter arose and the union struck over that grievance. The Court posed the issue as follows:

> Whether, as a matter of federal law, the strike which the union called was a violation of the collective bargaining contract is thus the ultimate issue which this case presents. It is argued that there could be no violation in the absence of a no-strike clause in the contract explicitly covering the subject of the dispute over which the strike was called. We disagree.[20]

The Court observed that:

> In a consistent course of decisions the Courts of Appeals of at least five Federal Circuits have held that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement. The National Labor Relations Board has reached the same conclusion. *W. L. Mead,*

[18] 417 U.S. at 255, emphasis added.

[19] Likewise instructive is the line of cases which deal with the question whether seniority rights under a collective bargaining agreement which covers employees at a particular plant survive and can be transferred when that plant is shut down but the employer continues the same operations at a different plant. In *Zdanok* v. *Glidden Co.,* 288 F.2d 99 (1961), affirmed on another issue, 370 U.S. 530 (1962), the Second Circuit held that such an obligation does survive. But the *Glidden* decision was strongly criticized, and when it was first invoked as precedent in *Oddie* v. *Ross Gear & Tool Co.,* 305 F.2d 143 (1962), the Sixth Circuit expressly declined to follow it, saying in part, "we must construe the contract as it is written, rather than make a new contract for the parties" (*id.* at 148). Ultimately, the Second Circuit itself unanimously overruled *Glidden* in *Local 1251, etc.* v. *Robertshaw Controls Co.,* 405 F.2d 29, 33 *(en banc)*:

> The *Glidden* opinion stated that the court was "adopting the more rational, not to say humane, construction" of the agreement and that another construction "would be irrational and destructive." 288 F.2d at 104. However, as Chief Judge Lumbard said in his dissent in *Glidden*:
>
> > "We are called upon to construe the contract upon which the parties agreed and not to substitute for it one with more humane or less destructive terms." 288 F.2d at 105.
>
> Those few who have applauded the decision have not attempted to justify it in terms of contract analysis. Rather they have sought to defend the result upon the basis of equitable considerations or of national labor policy. The sources of these policies and equities are obscure and there is the gravest doubt of the power of the federal courts to apply them in derogation of the contract of the parties.

[20] 369 U.S. at 105.

Inc., 113 NLRB 1040. We approve that doctrine.[21]

And the Court concluded:

> The grievance over which the union struck was, as it concedes, one which it had expressly agreed to settle by submission to final and binding arbitration procedings. The strike which it called was a violation of that contractual obligation.[22]

In *Haislip*, which was cited with approval on this point in *Lucas Flour*, the Court of Appeals made the same point:

> [W]e think it clear that the purpose of the contract was to require the settlement of disputes and grievances by a procedure which would not cause the disruption of business that would necessarily result from a strike and that a strike without following such procedure was necessarily a breach.

The lower court and Board cases cited in *Lucas Flour* and the Court's conclusion there reflect the understanding first stated in *Lincoln Mills, supra*, that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."[23] Thus, the *Lucas Flour* rule rests on

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[21] 369 U.S. at 105, footnote omitted.

The Court cited: *Local 25, Teamsters Union* v. *W. L. Mead, Inc.*, 230 F.2d 576, 583-584 (C.A.1); *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, 876-877 (C.A.4); *Labor Board* v. *Dorsey Trailers, Inc.*, 179 F.2d 589, 592 (C.A.5); *Lewis* v. *Benedict Coal Corp.*, 259 F.2d 346, 351 (C.A.6); *Labor Board* v. *Sunset Minerals*, 211 F.2d 224 (C.A.9).

[22] 369 U.S. at 106.

[23] 353 U.S. at 455. See also *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582: "[T]he parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs."

the uniform understanding that a promise to arbitrate is not simply an agreement to submit a dispute to a particular tribunal but an undertaking to "substitute [arbitration] for industrial strife."[24] In those cases then the promise not to strike was implied *in fact* from the express promise to arbitrate fairly read in light of settled legal principles.

The approach to contract interpretation of the *Lucas Flour* Court is further illuminated by recalling the limitations which the Court itself placed on its holding:

> What has been said is not to suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be exclusively covered by compulsory terminal arbitration. Nor is it to suggest that there may not arise problems in specific cases as to whether compulsory and binding arbitration has been agreed upon, and, if so, as to what disputes have been made arbitrable.[25]

The Court said also:

> Deciding the case as we do upon this explicit ground, we do not adopt the reasoning of the Washington court. Insofar as the language of that court's opinion is susceptible to the construction that a strike during the term of a collective bargaining agreement is *ipso facto* a violation of the agreement, we explicitly reject it.[26]

In this, the *Lucas Flour* opinion follows the intent of the Senate Report on Taft-Hartley that the adoption of a no-

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[24] *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578. As later stated in *Boys Markets* v. *Retail Clerks*, 398 U.S. 235, 249, "the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures."

[25] 369 U.S. at 106.

[26] *Id.* at 105, n.14.

strike promise "is certainly a point to be bargained over", (see p. 5, *supra*). Just so, while § 203(d) of the Act expresses a policy favoring that resolution of grievance disputes by arbitration or similar agreed upon dispute mechanisms, and this policy is given weight in interpreting the scope and effect of arbitration provisions, this Court has left no doubt that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[27] These related holdings were summarized in *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 382:

> Thus, an arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties.

(3) In short, the result reached in *Lucas Flour* is based on the application to suits under § 301 of a traditional contract principle: The Court determined that the promise to submit disputes to final and binding arbitration is "instinct with an obligation imperfectly expressed" not to strike over such disputes. (Cardozo, J. in *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 90, 118 N.E. 214). That principle would provide a legal basis for the theory of relief here, if it were true that, as petitioner argues, a no-strike promise would be "illusory unless it is construed to contain a promise to use all reasonable means to prevent and terminate [unauthorized] strikes" (Pet. Br. 26). According to petitioner, "a construction of the contracts here to permit the International to relieve itself of its obligations simply by

[27] *Warrior & Gulf, supra*, 363 U.S. at 582. It is for this reason that the petitioners' strained and entirely novel reading of § 204 of the Act (Pet. Br. 21-22), even if correct avails it nothing.

delegating them to its Locals would effectively render the 'no-strike' promise illusory." (Pet. Br. 27.) But petitioner is mistaken when it states that the International has delegated any of its obligations to its locals. That assertion is merely a rephrasing of petitioner's prior assertion, likewise unsupported by any reference to the record, "The performance of its obligations to resolve disputes not natural in character was assigned to its districts and locals, here the District and the Locals." (Pet. Br. 26.) In fact, the contracts did *not* impose the obligation "to resolve disputes not national in character" on the International; rather the obligation was "assigned to its District and Locals" *by the contracts themselves.* (A. 175-176, 182-183; see also the description of the grievance procedure at Pet. Br. 8-9.) Thus, while we readily accept the proposition "that the mere assignment of an obligation under a contract does not relieve the original obligor of responsibility for its performance" (Pet. Br. 26), that principle is simply inapplicable under the terms of the contracts in this case.

Petitioner also adopts a portion of the opinion of the Third Circuit in *Eazor Express, Inc.* v. *International Brotherhood of Teamsters, etc.*, 520 F.2d 951, 959-960 (C.A. 3), *cert. denied*, 424 U.S. 935 where that court stated as a general proposition that implication of a duty to exert all reasonable means to end an unauthorized strike is necessary lest the no-strike promise in the agreement be rendered "illusionary". We submit that the *Eazor* court was wrong.

Far from being "illusory", a "no-strike" promise gives the employer two very substantial benefits: *First*, he obtains a promise, enforceable against the union, that the union will not authorize, encourage or prolong a strike by the actions of its agents. This protects the employer in all

situations except those where there is a spontaneous work stoppage or one which is led by individuals who are not agents of the union. Employers have obtained substantial damage judgments against unions for authorized breach-of-contract strikes. And, since *Boys Markets* v. *Retail Clerks*, 398 U.S. 235 employers can obtain injunctions against strikes over an arbitrable grievance. *Second*, and in all cases, the employer obtains the right to discharge or otherwise discipline the strikers, whose concerted activity would otherwise be protected by § 7 of the NLRA. (See pp. 7-8, *supra*.)

In another portion of the opinion (that dealing with damages) the *Eazor* court said that a failure to require the unions not to utilize all the means available to them for ending an unauthorized strike,

> would make a hollow mockery of the unions no-strike pledge and would leave the plaintiffs without any remedy in damages if, as it has been held, the individual union members are not answerable in damages for illegal strike activity. *Sinclair Oil Corp* v. *Oil, Chemical and Atomic Workers International Union*, 7 Cir. 1971, 452 F.2d 49.[28]

The cited *Oil Workers* decision drew the conclusion that employees may not be sued for damages for engaging in unauthorized strikes from a thorough examination of § 301 (b). We believe that this construction is correct, but submit that the fact that Congress has established an immunity for one class of defendants is no basis for imposing a liability on some other potential defendant just so the plaintiff may

[28] 520 F.2d at 967.

recover damages from *someone*.[29] Congress' adoption of § 301(b) did not disable the legislature from also adopting § 301(e), thereby making unions liable for the acts of their agents rather than a provision making unions liable for the unauthorized acts of members. And the courts, of course, cannot rewrite Taft-Hartley to achieve the latter result because they believe employers should collect damages for unauthorized strikes. Yet in *Eazor*, the District Court said,

> Moreover, realistically, in the absence of such an implied obligation, without intending to impugn the integrities of any of the unions involved in this action, the way is clear for a union to furtively call for or encourage an activity while publicly disavowing it. [357 F.Supp. 158, 165, n. 12.]

This exercise in realism is misplaced. Congress was conscious that proof of agency would sometimes be difficult to establish, but nevertheless adopted the common law test of agency rather than some other standard (like that in the original Wagner Act) which would have made it easier to impute liability to an alleged principle. (See pp. 5-7, *supra*.) The District Court's reasoning circumvents that legislative determination by implying in law an obligation never under-

[29] On the basis of this reasoning, and the court's view (which we discuss at pp. 24-26 hereof) that it was "highly probable that the unions could have ended the strikes promptly" (520 F.2d at 967), the *Eazor* court relieved the plaintiff employer of the need for establishing that the strike losses which is recovered were proximately caused by the union's breach of the duty whose existence it had implied.

In *Oil Workers* the Seventh Circuit left the present question open, contrasting *U.S.* v. *Railroad Trainmen*, 27 LRRM 2308 (which held a union in contempt of an injunction) with *Haislip, supra* and *Lewis* v. *Benedict Coal Corp.*, 259 F.2d at 346 (C.A. 6), affirmed in part and modified in part, 361 U.S. 459 (see 452 F.2d at 54, n.10).

taken where sufficient proof of agency is unavailable.[30]

The practical judgment of management representatives that these benefits are substantial—as opposed to their advocacy position that they are not—is reflected by the prevalence of no-strike clauses, and the almost universal insistence thereon by employers in the many years before the *Eazor* court implied therefrom the additional union duty to police unauthorized strikes.[31] Yet these practical realities which make the no-strike promise so valuable

[30] While this would be improper even if Congress' judgment is thought to be unrealistic, it may not be amiss to observe that triers of fact are not unsophisticated in detecting possible subterfuges. See, for example, *Benedict Coal*, *supra*, 259 F.2d at 351-352, where the jury, properly instructed under § 301(e), found a union responsible under circumstances like those which troubled the District Court in *Eazor*.

[31] *Eazor* was decided in 1975, 20 years after *Haislip* declared that no such duty exists unless expressly undertaken and 28 years after Taft-Hartley was enacted. The only case cited by the *Eazor* court as establishing such a duty, *Penn Packing Co., Inc.* v. *Amalgamated Meat Cuters, Local 195*, 497 F.2d 888, 891 (C.A.3) was decided in 1974. Actually, the *Eazor* court's reliance on that case (520 F.2d at 960) was entirely misplaced because the *Penn Packing* agreement provided, "The Union for itself *and for its individual members* agrees and *guarantees* that there shall be *no* strike, stoppage of work, slowdown, or other interference with production." Thus that case is not one in which the court created an implied duty never actually agreed to but one based on the express terms of the contract which provided a no-strike "guarantee" by the unions for itself and "its individual members." Indeed, in construing this "guarantee" the *Penn Packing* court held that "the union did not agree to pay for any loss to the employer from an unauthorized strike but did commit itself to use its best efforts to end the stoppage as soon as practicable." Thus, that court read the contract narrowly not as a basis to create obligations never anticipated by the parties.

to employers are totally ignored in the *Eazor* opinion and by petitioner here.[32]

[32] The *Eazor* court found the unions liable because they had not brought to bear against the strikers "the arsenal of powerful measures available to" them. (520 F.2d at 966-967.) That court did not consider that in 1947 Congress had depleted that arsenal by forbidding unions from insisting upon the discharge of employees whom they had expelled and had left only the employers with the heavy hardware—the power to deprive strikers of their jobs. Moreover, in stressing the unions' authority under their constitution to place in trusteeship a local which was unable to put an end to a "wild cat" strike, that court paid no heed to the limitations of that course. In those instances where only a fraction of the members of the local were involved in the "wild cat" strike (as in *Eazor* itself, see pp. 11-12, *supra*), the imposition of a trusteeship would be unfair to the non-striking members by depriving them of local autonomy without any fault on their part. And in a case like the present where all the members of a local (or locals) are involved in the illegal strike, the imposition of a trusteeship or the lesser measure of removing local officers who are involved in the strike deprives *elected* officials of their authority and places that authority in an *appointee* of the International. The effective exercise of that authority is, moreover, severely diminished by the limits which Congress has placed on the permissible consequences of union discipline. As we have seen, this was foretold by Professor Cox when Taft-Hartley was passed. Further, in imposing discipline, unions "in all cases must comply with the Landrum-Griffin Act's procedural requirements, rendering impossible the quick response envisioned by the *Eazor* court." (Note, 89 Harv. L. Rev. 601, 608 (1976), omitting a footnote which cites § 101(a)(5) of that Act, 29 U.S.C. § 411(a)(5). See p. 10, *supra*.) None of this is to deny that in some instances union discipline or the threat thereof will have a salutory effect in avoiding or terminating "wild cat" strikes. And if the employer successfully bargains for a promise that the union will use every reasonable means to terminate such a strike, the union should, of course, be held to its promise. But we do say that the contention that such a duty should be *implied* rests on a power relationship which is wholly "illusory." Consider, in addition to the *Eazor* opinion, the following statement of a management advocate of this theory:

Certainly, the 1947 Congress believed that it was a substantial accomplishment when, giving particular attention to no-strike promises, § 301 was enacted to provide, as detailed above, that collective agreements were to be legally enforceable, and that unions would be liable to suit and responsible for their agents. So too, that Congress believed that it was reinforcing a valuable employer sanction when it amended § 13 to confirm the employers' disciplinary power over employees who strike in violation of a no-strike clause. Yet, the evidence negates any suggestion that the Congress contemplated that what it had done would be but an illusion unless the courts were to read into the no-strike promise the duty for which petitioner contends. And surely Chief Judge Parker believed that he was engaging in a meaningful endeavor when, in *Haislip,* he implied a no-strike obligation from a promise to resolve disputes by arbitration, but refused to take the further step of implying an obligation on the union to use all reasonable efforts to end an unauthorized strike.

(C.) In contrast to the general understanding that a union's arbitration promise includes an undertaking not to authorize a strike over an arbitrable issue which governed the result in *Lucas Flour* and *Haislip,* it has not been understood that an arbitration or no-strike clause is an undertaking to use all reasonable means to end unauthorized strikes. For "the context in which the parties bargained and the

A concept of broad union responsibility—perhaps bordering upon an insurer or guarantor type of liability—would not appear to place an undue burden upon the one party which has the power and ability to demand of employees strict compliance with the collective bargaining agreement. [Spelfogel, *Wildcat Strikes and Minority Concerted Activity—Discipline, Damage Suits and Injunctions,* 25 Lab.L.J. 592, 610-611 (Sept. 1973).]

basic regulatory scheme underlying that context,"[33] specifically, the decisions made by Congress in 1947 lead straight to *Haislip's* further holding which the court below properly followed here:

> There is nothing in the contract making defendants liable for "wild cat" strikes or requiring that they take any action with regard to them. This court has pointed out that employees who engage in "wild cat" strikes lose the protection of the [National Labor Relations] Act and may be discharged by their employers with impunity for so doing. N.L.R.B. v. Draper Corporation, 4 Cir., 145 F.2d 199, 156 A.L.R. 989. We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do; and there manifestly is no such liability. If Morris and Belcher had done nothing when plaintiff called on them to help get the men back to work, there would have been no liability on the part of the defendants. This being true, defendants were not rendered liable by the efforts which these men made to bring about an adjustment of the difficulty, even if they did not do everything that they might have done to that end. *The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike.*[34]

In sharp contrast, the ultimate rationale of the *Eazor* line of cases as restated in the conclusion of the opinion in *Republic Steel Corp.* v. *U.M.W. of America,* 570 F.2d 467, 479 (C.A.3) does not rest on the complex of legislative policies and their adjustment that informs the Taft-Hartley Act but on the Third Circuit's own policy judgments:

> Our holding that the International may be liable is mandated by the public interest. The International un-

[33] Cf. *NLRB* v. *C & C Plywood Co.,* 385 U.S. 421, 430.

[34] 223 F.2d at 877-878, emphasis added.

> ion simply must bear certain obligations if it is to continue to be entitled to the rights and benefits accorded by our national labor policy. To the extent that any union—local, district, or international; craft, industrial, or independent—refuses to enforce appropriately authorized union discipline upon recalcitrant members who violate either collective bargaining agreements or internal by-laws of the union that union can be said to have abrogated a proportion of valued rights granted to the union under our national labor policy.

With this imperious statement of the obligations "union[s] simply must bear * * * to be entitled to the rights and benefits accorded by our national labor policy" the Court of Appeals has taken leave of the judicial realm and entered that already occupied by the legislature which affirmed those rights—"which are fundamental" (*Jones & Laughlin, supra,* 301 U.S. at 33)—and did not so condition them. We submit that the Third Circuit has engaged in precisely that "free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements" [35] against which this Court forcefully admonished in *Howard Johnson.*

CONCLUSION

For the above stated reasons the aspect of the decision below before this Court should be affirmed.

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[34] 417 U.S. at 255.